United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-1941

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLEE,

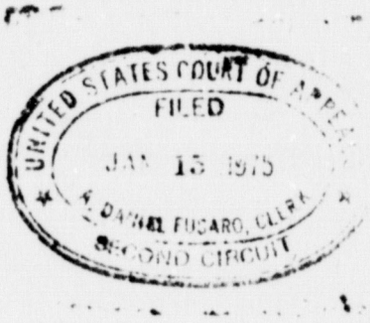
v.

WILLIAM MARRAPESE, ET AL.,

DEFENDANT, APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT-APPELLANT
(From Judgment and Sentence)



By His Counsel,
RAYMOND J. DANIELS
86 Weybosset St., Suite 502
Providence, R.I. 02903
JOHN O'NEILL
9 Steeple Street
Providence, R. I. 02903

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TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Statement of Facts	3
Argument	5
I. The Trial Court's Error in Denying Appellant Marrapese's Motions (A) For Judgment of Acquittal Due to the Insufficiency of the Evidence To Sustain a Conviction, (1) at the Conclusion of the Government's Case, and (2) at the Conclusion of All of the Evidence, and (3) Following Conviction To Set Aside the Verdict and Enter Judgment of Acquittal and (B) For a New Trial, Pursuant to Rules 29 (a), (b), (c), and 33, Respectively, of the Federal Rules of Criminal Procedure, Deprived the Appellant of His Guarantees Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.	5
II. The Trial Court's Ruling, Admitting into Evidence Certain Tape Recordings and Their Contents and Written Transcriptions Thereof, Deprived the Appellant Marrapese of His Guarantees Pursuant to the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.	33
III. The Trial Court's Ruling Denying Co-defendant David Guillette's Pretrial Motion To Suppress Deprived the Appellant Marrapese of His Constitutional Guarantees Pursuant to the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.	57
IV. The Trial Court's Error in Denying Appellant's Motion To Dismiss Count I of the Indictment For Lack of Jurisdiction Deprived the Appellant of His Guarantees Pursuant to the Fifth,	

Page

Sixth and Fourteenth Amendments to the United States Constitution. 60

V. The Trial Court Erred in Denying Appellant's Motions (A) To Dismiss the Indictment on the Ground That Appellant Was Indicted by a Biased Grand Jury and (B) To Conduct a Voir Dire Examination of Each Grand Juror as to Any Bias or Prejudice Against the Appellant and His Co-defendants. 62

VI. The Trial Court's Error in Denying Appellants' Motion To Waive a Trial by Jury Denies the Appellant Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution. 63

Conclusion 65

Table of Citations

Cases

Anderson v. *United States*, 94 S. Ct. 2253 (1974) 61

Bryan v. *United States* (1950) 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335 7

Commonwealth v. *Kluska*, 3 A.2d 398 (1939—Pa.) 38

Commonwealth v. *Weeden*, (Penna. 7-1-74) Cr. L. Rptr. 2371 57

Jones v. *United States*, 362 U.S. 261 57

Kempe v. *United States*, 151 F.2d 680 (2nd Circ. 1945) 50

Kraft v. *United States*, 238 F.2d 794 (8th Circ. 1956) 40

Labiosa v. *Government of the Canal Zone*, 198 F.2d 282 (5th Cir. 1952) 40

LaFrance v. *Bohlinger*, 499 F.2d 29 (1st Cir. 1974) 57

McDonald v. *United States*, 335 U.S. 451 57

Michelson v. *United States*, 335 U.S. 469 (1948) 50

People v. *Cahan*, 44 Cal. 2nd 434, 282 P.2d 905 57

People v. *Glass*, 158 Cal. 650, 112 P. 281, 293 (1910) .. 38

People v. *Martin*, 45 Cal. 2d 775, 290 P.2d 855 57

People v. *Smith*, 230 N.Y.S. 2d 894 (1962) 57

Page

People v. *Whalen*, 160 P.2d 560 (1945) 38
Schoeneman v. *United States*, 115 U.S. App. D.C. 110, 317 F.2d 173, 177 (1963) .....
Sgro v. *United States*, 287 U.S. 206, 53 S. Ct. 138, 77 L.Ed. 260 (1932) 60
Shaffner v. *Commonwealth*, 72 Pa. St. 63 52
Simmons v. *United States*, 380 U.S. 377 57
Singer v. *United States*, 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 64
State v. *Atkenson*, 285 S.W. 2d 563 (1965—Mo.) 38
State v. *Tella*, 321 A.2d 87 (6/12/74) 59, 60
United States v. *Bozza*, 365 F.2d 206 (2nd Circ. 1966) 36, 50
United States v. *Bradwell*, 38 F.2d 619, 622 (2nd Circ. 1968) 36, 38, 39, 46, 49, 50
United States v. *Byrd*, 352 F.2d 570 (2nd Circ. 1965) 43, 44, 45, 46, 49, 50
United States v. *Deaton*, 381 F.2d 114 (2nd Circ. 1967) 36, 50
United States v. *DeCicco*, 435 F.2d 478 (2nd Circ. 1970) 51
United States v. *Goldstein*, 168 F.2d 666 (C.A. 2d 1948) 6
United States v. *Johnson*, 382 F.2d 280 (2nd Circ. 1967) 50
United States v. *Kaplan*, 416 F.2d 103, 104 (2nd Circ. 1968) 36
United States v. *Marrapese*, 486 F.2d 918 (2nd Circ. 1973) 56
United States v. *Pacelli*, 491 F.2d 1108 (2nd Circ. 1974) 61
United States v. *Ramirez*, 279 F.2d 712, 715 (2nd Circ. 1960) 60
United States v. *Robinson*, 311 F. Supp. 1063 (1969—Mo.) 62
United States v. *Robinson*, (D.D.C.—1947) 71 F. Supp. 9 ..... 6, 7, 20
United States v. *Ross*, 321 F.2d 61, 67 (2nd Circ. 1963) 44, 45, 46
United States v. *Smith*, 283 F.2d 760 (2nd Circ. 1960) 50
United States v. *Spica*, 413 F.2d 129 (2nd Circ. 1969) 40, 41
United States v. *Valenti*, 134 F.2d 362, 364, *cert. den.* (1943), 319 U.S. 761 (C.C.A. 2d) 6

each element alleged, the insufficiency of proof can easily

Page

Wiley v. *State*, 324 S.W. 2d 862 (1959—Texas) 38
Wong Sun v. *United States*, 371 U.S. 471 (1963) 57, 58, 59
Yick Wo v. *Hopkins*, 118 U.S. 356 62

Constitutional Provisions

U. S. Constitution,
Fourth Amendment 2, 33, 37, 57
Fifth Amendment 2, 33, 37, 60,61
Sixth Amendment 1, 2, 5, 32, 33, 57, 60
Ninth Amendment 2, 33, 37
Fourteenth Amendment 1, 2, 5, 32, 33, 57, 60, 63

Statutes

18 U.S.C. 241 ..... 2, 60, 61
1503 2
844 (h) (i) 2
Federal Rules of Criminal Procedure,
Rule 29(a) 1, 3, 5, 60
Rule 29(b) 1, 3, 5, 60
Rule 29(c) 1, 3, 5, 60
Rule 33 ..... 1, 3, 5
Rule 52(b) 58

Miscellaneous

11 Duquesne L. Rev. 179 57
McCormack, Evidence, Section 190 41
Note, 13 U.C.L.A. L. Rev. 189 (1965) 64
Underhill, Criminal Evidence 49
38 U. of Cincinnati L. Rev. 691 57

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QUESTIONS PRESENTED

I. The Trial Court's Error in Denying Appellant Marrapese's Motions (A) For Judgment of Acquittal Due to the Insufficiency of the Evidence to Sustain a Conviction, (1) at the Conclusion of the Government's Case, and (2) at the Conclusion of All of the Evidence, and (3) Following Conviction To Set Aside the Verdict and Enter Judgment of Acquittal and (B) For a New Trial, Pursuant to Rules 29 (a), (b), (c), and 33, Respectively, of the Federal Rules of Criminal Procedure, Deprived the Appellant of His Guarantees Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

II. The Trial Court's Ruling, Admitting Into Evidence Certain Tape Recordings and Their Contents and Written Transcriptions Thereof, Deprived the Appellant Marrapese of His Guarantees Pursuant to the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

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IV. The Trial Court's Error in Denying Appellant's Motion to Dismiss Count I of the Indictment for Lack of Jurisdiction Deprived the Appellant of His Guarantees Pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

V. The Trial Court Erred in Denying Appellant's Motions (A) to Dismiss the Indictment on the Ground that Appellant Was Indicted by a Biased Grand Jury and (B) to Conduct a Voir Dire Examination of Each Grand Juror as to Any Bias or Prejudice Against the Appellant and His Co-Defendants.

VI. The Trial Court's Error in Denying Apellant's Motion to Waive a Trial by Jury Denied the Appellant of Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On June 14, 1973, the Federal Grand Jury sitting at Hartford, Connecticut returned an indictment against Robert Joost, David Guillette, William Marrapese and Nicholas Zinni charging each in three counts thereof with violations of 18 U.S.C. Sections 241, 1503 and 844 (h) (1). (R. Vol. XIII, Doc. 13) (A. 3).

The Court granted motions for severance. Defendants Joost and Guillette were convicted by Jury before the Honorable T. Emmett Clairie, at Hartford in January 1974. And appellants Marrapese and Zinni were convicted

by Jury on June 12, 1974 before the Honorable Thomas F. Murphy, at Waterbury, Connecticut. A timely Motion For New Trial was denied by the Court on June 26, 1974, and Appellant Marrapese and co-defendant Zinni were each then sentenced by the Court to life imprisonment on Count 1, 5 years on Count 2, and 10 years on Count 3, all to run concurrently. A Motion For a New Trial based upon (1) Newly Discovered Evidence and (2) Prosecutorial Suppression of Material Evidence was subsequently filed by each defendant. On September 5 and 6, 1974 hearing was held on said motion, and on October 19, 1974 the Court denied the motion. Timely notices of appeal have been filed by Appellants Marrapese and Zinni (A) from the verdict, judgment and sentencing, from the Court's denial of the Motion For a New Trial on the ground that the verdict was against the weight of the evidence, and in the interest of justice (C.A. No. 74-1941), and (B) from the Court's denial of the Motion For a New Trial based upon (1) newly discovered evidence, and (2) prosecutorial suppression of material evidence. (C.A. No. 74-2649).

STATEMENT OF FACTS

A detailed analysis of both the Government and Defense case is set forth in "Question Presented Number One and Argument Thereon", pertaining to the Court's denial of defense motions for judgment of acquittal, to set aside the verdict, and for a new trial based upon the insufficiency of the evidence, and that the verdict was against the weight thereof, pursuant to Rules 29 (a) (b) (c) and Rule 33 of the Federal Rules of Criminal Procedure.

Briefly, the Government's case consists of three parts:

(1) The playing for the jury, while they read along from a transcription thereof, of a highly prejudicial and inflammatory tape recorded conversation, which occurred on March 31, 1972, between Daniel LaPolla, who had been secretly wired by A.T.F. Agents, and allegedly Appellant Marrapese, co-Appellant Zinni and certain other persons,

wherein Appellant Marrapese allegedly declared an intention to dynamite the Brooklyn, Connecticut Jail. This was offered by the Government as "prior act or offense" evidence, and over defense objection, admitted into evidency by the Trial Court. (See Argument II).

(2) Testimony of the principal Government witness, John Anthony Housand, to his alleged association with the named defendants between April and June 1972, including his presence at an alleged 15 minute 'conspiratorial' meeting commencing at approximately 10:00 A.M. at Carter's Jewelry Store, Cranston, Rhode Island, wherein he was allegedly hired by the named defendants to shoot Daniel LaPolla for the sum of $5,000.00.

(3) Testimony from various witnesses concerning attempts between May and September 1972 to locate Daniel LaPolla by co-defendants Joost and Guillette, Appellant Marrapese, his attorneys, Andrew Bucci and John O'Neill, and a private investigator, Robert Joyal, hired to do so by Attorney Andrew Bucci.

Briefly, the Defense case consisted of several parts:

(1) Cross-examination of the Government's principal witness, John Anthony Housand, to illustrate:

(a) his lack of integrity and credibility, as indicated by his lengthy criminal record of offenses relating directly to fraud and misrepresentation such as forgery and larceny, coupled with his admissions of earning his livelihood for many years by the use of numerous aliases, and by fabrication and misrepresentation, both orally and by forged documents.

(b) his motive to fabricate, as indicated by numerous promises made to him by the Government including monies and to appear on his behalf before the Parole Board at a time when he had spent the better part of eight years in prison for various offenses and had just been sentenced to an additional six year term.

(c) The numerous inconsistencies existing between his trial testimony in June 1974, and that of his testimony at prior proceedings, and his written statements, and the testimony of other defense witnesses.

(2) Testimony of a number of the most credible defense witnesses, together with certain documentary exhibits, to prove conclusively that Mr. Housand's bizarre story of a 'conspiratorial' meeting having occurred around 10:00 A.M. on Monday morning, May 8, 1972 at Carter's Jewelry Store, Cranston, Rhode Island was absolutely false, since Attorney Andrew Bucci, Appellant Marrapese, and co-defendant Zinni were in the Providence Superior Courthouse from shortly before 10:00 A.M. to noontime on May 8, 1972. These witnesses included Superior Court Judge John S. McKiernan (former Lieutenant Governor of Rhode Island for ten years), a Rhode Island Senator, five lawyers, the stenographic court reporter, two police officers, one being Detective Fuina, the investigating officer in the Providence Superior Court case, and 'Police Officer of the Year' in 1972. The evidence revealed that the alleged locale of the supposed meeting, Carter's Jewelry Store, was no longer in business on May 8, 1972.

ARGUMENT

I. THE TRIAL COURT'S ERROR IN DENYING APPELLANT MARRAPESE'S MOTIONS (A) FOR JUDGMENT OF ACQUITTAL DUE TO THE INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CONVICTION, (1) AT THE CONCLUSION OF THE GOVERNMENT'S CASE, AND (2) AT THE CONCLUSION OF ALL OF THE EVIDENCE, AND (3) FOLLOWING CONVICTION TO SET ASIDE THE VERDICT AND ENTER JUDGMENT OF ACQUITTAL AND (B) FOR A NEW TRIAL, PURSUANT TO RULES 29 (a), (b), (c), AND 33, RESPECTIVELY, OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, DEPRIVED THE APPELLANT OF HIS GUARANTEES PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Trial Court denied Appellant Marrapese's Motion For Judgment of Acquittal due to the insufficiency of the evidence presented by the Government to sustain a conviction pursuant to Rule 29 (a), (Tr. 917); 29 (b), (Tr. 1431); 29 (c) and 33 (Tr. 1749) of the F.R.Crim.Proc.

Appellant Marrapese respectfully contends that a comparison of (1) the 'Facts Presented' by the Government

mite bomb at Daniel LaPolla's house and, therefore, "did

at trial with (2) the 'Elements of Each Offense' as set forth in each of the three counts of the indictment, indicates a complete insufficiency of evidence presented to sustain a conviction of such offenses.

Concededly, the scope of judicial review of the sufficiency of the evidence in criminal cases utilized within the Court of Appeals for the Second Circuit, viz., the so-called "Second Circuit Rule," as crystallized in the opinion of Judge Clark in *United States* v. *Valenti,* (CCA 2d) 134 F.2d 362, 364, *cert. den.,* (1943) 319 U.S. 761 is that the standard of proof beyond a reasonable doubt is not incorporated into the legal test.

However, where, following the Court's denial of the defendant's motion for judgment of acquittal at the conclusion of the Prosecution's case-in-chief, the defense goes forward with it's own evidence, the Court will consider all of the evidence when ruling on a second defense motion for judgment of acquittal at the conclusion of all of the evidence. For, in determining the sufficiency of the evidence at the close of the trial, subsequent to verdict, or on appeal, the Trial or Appellate Court, as the case may be, looks to the entire record and not simply to the evidence offered by the Government on it's direct case. *United States* v. *Goldstein,* (CA 2d 1948) 168 F.2d 666. And, while a motion for acquittal requires the Court to take the evidence in a "light most favorable to the Government," a motion to set aside the verdict as against the weight of the evidence allows the Court to consider the credibility of Government witnesses. As Judge Holtzoff stated in *United States* v. *Robinson,* (DDC 1947) 71 F. Supp. 9, 10-11:

> "On a motion for a new trial on the ground that the verdict is against the weight of the evidence, the power of the Court is much broader. On such an application, the Court may weigh the evidence and consider the credibility of witnesses. If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of

Housand's integrity and credibility were satisfactorily im-

justice may have resulted, the verdict may be set aside and a new trial granted". . . . .

And, an Appellate Court may remand for a new trial, after reversing a conviction for the insufficiency of the evidence, predicated on 28 U.S.C. Section 2106. (See *Bryan* v. *United States,* (1950) 338 U.S. 552, 70 S. Ct. 317).

Count 1 of the indictment, (R. Vol. XIII, Doc. 13) (A. 3), in brief, alleges that from on or about May 4, 1972 until September 29, 1972, IN THE DISTRICT OF CONNECTICUT AND ELSEWHERE, the defendants Guillette, Joost, Marrapese and Zinni engaged in a conspiracy to injure and intimidate Daniel LaPolla, and further that this CONSPIRACY RESULTED IN THE DEATH OF DANIEL LAPOLLA. (Emphasis added by Appellant Marrapese).

Obviously, Count 1 encompasses any acts occurring either within or without the District of Connecticut.

However, Count 2 of the indictment specifically limits the probative acts to those "IN THE DISTRICT OF CONNECTICUT". Count 2 alleges, briefly, that on or about September 29, 1972 "IN THE DISTRICT OF CONNECTICUT" defendants Guillette, Joost, Marrapese and Zinni unlawfully endeavored, BY FORCE AND VIOLENCE, to influence, intimidate and impede Daniel LaPolla (Emphasis added by Appellant Marrapese). In light of the meticulous preciseness with which the Government's entire case has been prepared and presented from the outset, one can only conclude that such a restrictive limitation in Count 2 to those probative acts, performed "IN THE DISTRICT OF CONNECTICUT", without the added wording "AND ELSEWHERE" as included within Count 1, was an intentional part of the pleading of Count 2.

In fact, Count 3 of the indictment exhibits even greater specificity in restricting the act set forth. Count 3 alleges, in brief, that on September 29, 1972 "IN ONECO, CONNECTICUT IN THE DISTRICT OF CONNECTICUT" defendants Guillette, Joost, Marrapese and Zinni DID UNLAWFULLY USE AN EXPLOSIVE, i.e., a dynamite bomb to injure and intimidate Daniel LaPolla, a witness in a Court of the

United States. (Emphasis added by Appellant Marrapese). This further narrowing and restriction of the allegations is obviously an intentional and conscious part of the pleading.

Summary of Facts Presented (1) in the Light Most Favorable to the Government Without a Consideration of Any Contradictory Facts Presented by the Defense and (2) Assuming Said Facts To Be True, Arguendo, Without Contesting the Credibility of Any Prosecution Witness Including John A. Housand (Appellant, however, takes great issue with Mr. Housand's credibility and version of said events.)

(1) Government Agents rigged Daniel LaPolla, a Government informant, with a sound recording device resulting in a recordation of a conversation on March 30, 1972 allegedly between Appellant Marrapese, defendant Zinni and Daniel LaPolla concerning (a) the theft of M-16 rifles from the Westerly, Rhode Island Armoury and (b) statements allegedly by Appellant Marrapese concerning the dynamiting of the Brooklyn Jail, Brooklyn, Connecticut. [The Government offered this under the theory of so-called "prior act or offense" evidence, rather than as a mere boast, or threat or declaration of intention. (See Issue Presented Number Two and Argument Thereon)].

(2) Defendants Guillette, Joost, Marrapese and Zinni were indicted in the United States District Court for the District of Connecticut for the theft of these M-16 rifles and arraigned thereon on May 4, 1972. Over defense objection (Tr. 5), this indictment naming Daniel LaPolla, but not as a co-defendant, was read in its entirety to the jury by the prosecution (Tr. 6-11) (A. 25).

(3) The principal prosecution witness, John Anthony Housand, testified that he has been at Guillette's home and has conducted various electrical experiments with Guillette in the basement, and is aware that Guillette has skills in this field (Tr. 297); that on May 4, 1972 following the defendants' arraignment at the United States Courthouse, Hartford, Connecticut, on the indictment involving

the theft of the thirty M-16 automatic rifles, (Tr. 319) he drove a vehicle containing several persons, including defendants Guillette and Joost, from Hartford to Providence (Tr. 324) and that enroute these two defendants allegedly asked him if he would kill Daniel LaPolla for $5,000.00, to which he agreed (Tr. 328, 329); that on May 8, 1972 at a meeting at Carter's Jewelry Store in Providence, Rhode Island, with defendants Guillette, Joost, Marrapese and Zinni, and an attorney Andrew Bucci present, he was allegedly asked if he would shoot Daniel LaPolla for $5,000.00 to which he allegedly agreed (Tr. 342); that thereafter he had a 'falling-out' with the defendants, and on June 13, 1972 left the State of Rhode Island without ever having attempted to shoot Daniel LaPolla (Tr. 336); that he was rearrested in Fayetteville, Arkansas on July 15, 1972 (Tr. 361), for an unrelated offense, then transferred to another prison in North Carolina, and remained in custody until April 1974 when he was paroled (Tr. 360).

(4) In May 1972 Appellant Marrapese and one George Hennebury went in Appellant Marrapese's vehicle to the local post office at Oneco, Connecticut attempting to locate Daniel LaPolla since Mr. LaPolla had some jewelry belonging to Appellant Marrapese (Tr. 569-570) (A. 26). After identifying himself to the post office employee, Appellant Marrapese was given an address. They went to the house and knocked but no one answered (Tr. 571). They also inquired at a nearby gas station, appellant Marrapese identifying himself by a card with his name on it (Tr. 591) (A. 26), but did not learn the whereabouts of Mr. LaPolla (Tr. 592).

(5) On July 29, 1972 Appellant Marrapese had a conversation in Providence with Mrs. Ann Kiley, a sister of Daniel LaPolla wherein he requested the whereabouts of Daniel LaPolla, to which she replied that she did not know, and to which he allegedly responded that he intended to subpoena her, and her brother, who was a Catholic priest, the Reverend LaPolla, and her sister Nancy, a Catholic nun, to testify as defense witnesses for

the Appellant Marrapese at his forthcoming trial for the theft of the M-16 rifles (Tr. 630-650).

(6) (Testimony of Defense witness, Attorney Andrew Bucci) — During the summer of 1972 Attorney Andrew Bucci and Appellant Marrapese drove in Appellant Marrapese's vehicle into the Oneco, Connecticut area in the vicinity of Daniel LaPolla's house trying to locate Mr. LaPolla. (Tr. 1258) They questioned certain local residents in this regard including a family operating a nearby gas station (Tr. 1259). They went to Mr. LaPolla's house and knocked but received no answer (Tr. 1261). They also went to a local stone quarry wherein the stolen M-16 rifles had allegedly been stored by LaPolla prior to the recovery of these rifles by Federal Agents (Tr. 1260). Shortly thereafter, Attorney Bucci hired a Mr. Robert Joyal, a private investigator in order to attempt to locate Mr. LaPolla. (Tr. 1263).

(7) (Testimony of Defense witness, Robert Joyal) — As the private investigator retained by Attorney Andrew Bucci, he conducted a surveillance, while seated in his vehicle in the vicinity of Daniel LaPolla's house, for several hours each day for nine successive days, from July 29th through August 6, 1972 (Tr. 929-944). Although he varied the hours in order to include both day and evening surveillance (Tr. 936) he was unsuccessful in observing Mr. LaPolla. (Tr. 944). His instructions, as given to him by Attorney Bucci, were that if he observed Mr. LaPolla, he was to tell Mr. LaPolla to contact Attorney Bucci (Tr. 956) (A. 27), and further, that if this witness, Mr. Joyal, was approached by any State or Federal law enforcement officers while he was in the area, he was to identify himself and advise them of his exact purpose in the area. (Tr. 957) (A. 27).

(8) At the end of July 1972 Appellant Marrapese identified himself (Tr. 605) to a Mr. Alfred Marafino, the present husband of Daniel LaPolla's ex-wife, Helen, seeking to locate Daniel LaPolla. (Tr. 602, 603) Mr. Marafino told him that they didn't want to get involved (Tr. 605), Appellant Marrapese allegedly stated that he could make it hard

for Mrs. Marafino and her son in the seminary (Tr. 604). They were interviewed shortly thereafter at a law office by Mr. Bucci's law associate, Attorney John O'Neill and another attorney in this regard, and they gave some information concerning Daniel LaPolla (Tr. 607).

(9) On September 7, 1972 Federal Agents observed a vehicle which was registered to the wife of Appellant Marrapese, in the Oneco, Connecticut area where Daniel LaPolla lived (Tr. 655). The vehicle, containing an unidentified white male, drove off at a high rate of speed and was not overtaken by the Agents (Tr. 667, 668). Daniel LaPolla was then, and had been for some time in Federal Protective Custody in various locations outside of Connecticut. (Tr. 147).

(10) On September 22 and 23, 1972, defendants Joost and Guillette, using their own names, rented a private airplane and a pilot from whom Guillette had taken flying lessons (Tr. 821), and told the pilot that they were looking for an individual in the Oneco, Connecticut area in order to serve him with some legal papers. (Tr. 793). While the pilot flew over Daniel LaPolla's home in Oneco, Connecticut, defendant Guillette in the airplane communicated through a walkie-talkie radio with defendant Joost on the ground. (Tr. 797) On September 22nd they did not see nor make any contact with LaPolla. On September 23rd, Guillette was informed by Joost through the walkie-talkie that Daniel LaPolla had returned to his home, looked at Joost from some distance and then left the area (Tr. 815). Neither Joost nor Guillette made any contact with Mr. LaPolla. Within the week following Daniel LaPolla's death on September 29, 1972, Guillette telephoned one of the pilots, asked him if he had read about the incident in Oneco, Connecticut the previous week, and requested of the pilot, that if he was asked about the flight, not to mention it (Tr. 818-819).

(11) (Testimony of Prosecution witnesses, and also Defense witnesses, Attorney Andrew Bucci, and Edith Marrapese, Appellant Marrapese's mother.)—On September 25, 1972, following the death from natural causes of the previously mentioned Reverend LaPolla, a wake was held

at a church in Providence. (Tr. 153) This wake was attended by a number of persons including Appellant Marrapese's grandmother, mother and aunt who are distantly related to Daniel LaPolla. (Tr. 920-921) (A. 27, 28). On this evening of September 25, 1972 at a time when Appellant's grandmother, mother and aunt were inside attending the wake (Tr. 920) (A. 27), Appellant Marrapese and Attorney Bucci attempted to enter where the wake was being held, in order to look for and interview Daniel LaPolla (Tr. 1265-1266) (A. 32). Several Federal Agents were on duty stationed at the wake, and Appellant Marrapese was refused admittance (Tr. 159). After some discussion, Attorney Bucci, however, was eventually allowed to enter, but did not see Mr. LaPolla in attendance, so he left. (Tr. 1266).

(12) The following day, Appellant Marrapese and Attorney John O'Neill, a law associate of Andrew Bucci, entered the church to observe Reverend LaPolla lying in state. (Tr. 640). They both signed their true names on the guest register at the church (Tr. 640) (A. 29). The following morning Joost and Guillette were observed at the cemetery in close proximity to the gravesite burial services.

(13) (Testimony of Defense witness, Mrs. Michaela Valletta)—On September 27, 1972, Appellant Marrapese and attorney, John O'Neill, and a law office secretary, Mrs. Michaela Valletta, went into the Oneco, Connecticut area to look for and interview Daniel LaPolla. (Tr. 970) They identified themselves, Mr. O'Neill leaving his attorney's business card while having a conversation with the family who operated the gas station very near Mr. LaPolla's house (Tr. 975) (A. 29). They were unable to obtain any information concerning Mr. LaPolla's possible whereabouts from these persons. (Tr. 977). They then went to the local stone quarry, again identified themselves to several persons there and stating their purpose to locate Mr. LaPolla, but again received no information in this regard. (Tr. 977-979). They then went to the local newspaper office to look at articles pertaining to the theft of the M-16 rifles (Tr. 980), and then to a bicycle shop where Appellant Marrapese purchased a bicycle for his 12 year old daughter's birthday on that date

(Tr. 983-984) (A. 29, 30), and finally they returned to the Rhode Island area following this unsuccessful attempt to locate and interview Daniel LaPolla. (Tr. 984).

(14) On the early afternoon of September 29, 1972 Daniel LaPolla was killed by an exploding dynamite bomb when he returned in his vehicle to his house in Oneco, Connecticut and attempted to enter the location.

(15) On Friday evening, September 29, 1972 at approximately 6:00 P.M. one George Hennebury went to Appellant Marrapese's house (Tr. 572), and at approximately 8:00 P.M. he and Appellant Marrapese went to the Colonial Hilton Motel, a large complex in Providence (Tr. 594) which he and Appellant Marrapese frequented practically every Friday evening (Tr. 595). He registered for a room under his own name. (Tr. 596) Later he was joined in the cocktail lounge by Appellant Marrapese and then by Attorneys Andrew Bucci and Raymond Coia. (Tr. 575) It was decided that Appellant Marrapese stay at the motel that evening in Mr. Hennebury's room until Attorney Andrew Bucci could determine why Federal Agents were parked around Appellant Marrapese's house. (Tr. 578) The following evening Mr. Hennebury was again at the Colonial Hilton cocktail lounge with Appellant Marrapese, and defendants Joost and Guillette (Tr. 600).

Appellant Marrapese respectfully contends that by an analytical comparison of the foregoing facts to each element alleged in each count of the indictment the insufficiency of the Government's proof becomes immediately obvious. WHAT OCCURRED DURING APPELLANT MARRAPESE'S TRIAL SHOULD BE CHARACTERIZED AS A "SHOT-GUN" METHOD OF PROOF, WHEREBY A NUMBER OF INNOCENT, INNOCUOUS OR EQUIVOCAL ACTS ARE LUMPED TOGETHER, AND THEN COMBINED WITH THE HIGHLY PREJUDICIAL AND INFLAMMATORY EVIDENCE OF THE TAPE RECORDED CONVERSATION CONCERNING THE ALLEGED BOMBING OF THE BROOKLYN, CONNECTICUT JAIL, AND CONVICTION THEREBY RESULTS! But, by breaking down each count of the indictment into it's component parts, and then searching the record for proven facts applicable to

each element alleged, the insufficiency of proof can easily be demonstrated.

Appellant Marrapese would respectfully suggest that the two basic elements necessitating proof in Count 1 are (1) that a conspiracy existed and (2) that such conspiracy 'Resulted in the Death of Daniel LaPolla.' Appellant Marrapese would further respectfully suggest that unless there is sufficient proof of Count 3, that is, the 'Use of Dynamite in Oneco, Connecticut on September 29, 1972' by the Named Defendants that there is no proof that any such conspiracy Resulted in the Death of Daniel LaPolla as alleged in Count 1. The same logical reasoning applies to Count 2 which requires sufficient proof that the named defendants 'in the District of Connecticut on September 29, 1972' unlawfully endeavored 'by Force and Violence' to influence, intimidate and impede Daniel LaPolla. Obviously, this "use of force and violence" refers to the same subject matter as the allegation in Count 3, "did unlawfully Use an Explosive, i.e. a Dynamite Bomb" to intimidate a witness, Daniel LaPolla. Thus, by logical reasoning, unless there is sufficient proof to convict as to Counts 2 and 3, there is not sufficient proof of the 'proximate causation' allegation in Count 1 viz, that such conspiracy "Resulted in the Death of Daniel LaPolla." A comparison of the proven facts with the Counts of the indictment in their reverse order might be suggested to better illustrate the Government's failure of proof in this case.

Count 3

Appellant Marrapese most strongly contends that there is not one shred of evidentiary proof in this case that any named defendant:

(1) On September 29, 1972 Used an Explosive, i.e. A Dynamite Bomb in Oneco, Connecticut.

(2) nor, for that matter, that any named defendant was even in Oneco, Connecticut on September 29, 1972, the day of the explosion.

Count 2

Again, Appellant Marrapese most strongly contends that there is absolutely no proof that any named defendant:

> (1) endeavored "BY FORCE AND VIOLENCE" to intimidate Daniel LaPolla IN THE DISTRICT OF CONNECTICUT ON SEPTEMBER 29, 1972, or at any time.
> (2) nor that any named defendant was EVEN IN THE DISTRICT OF CONNECTICUT ON SEPTEMBER 29, 1972, the day of the explosion.

By limiting the probative acts to those performed WITHIN CONNECTICUT the Government obviously concedes that it does not consider as acts of "INTIMIDATION" those acts performed OUTSIDE the District of Connecticut. This includes those acts performed within the State of Rhode Island, such as Appellant Marrapese's conversations with Mrs. Kiley, the sister of Daniel LaPolla, and with Mr. Marfino, each of which conversations related to an attempt to locate the whereabouts of Daniel LaPolla in order to interview him preparatory to trial, and in Mrs. Kiley's case, appellant Marrapese's stated intention to subpoena Mrs. Kiley, her brother the Reverend LaPolla, and her sister the Catholic nun as defense witnesses for Appellant Marrapese at his forthcoming trial for the theft of the M-16 rifles. Other acts which are not considered "acts of intimidation" by the Government, since they also occurred OUTSIDE the District of Connecticut and within Rhode Island, include the visits of the named defendants and Attorney Andrew Bucci and his law associate, Attorney John O'Neill to the wake, and church, where Father LaPolla lie in state, in order to locate and interview Daniel LaPolla, and wherein Attorney O'Neill and Appellant Marrapese both signed their true names in the church guest register. In any event, not one of the above acts (1) occurred on September 29, 1972, (2) or within the District of Connecticut (3) nor was there any "force or violence" associated with such acts, (4) nor was there any "impeding" of Daniel LaPolla since they never made contact nor even saw Mr. LaPolla at any time.

The only acts which occurred within the District of Connecticut were (1) the airplane flights of Joost and Guillette, and (2) the visits into the Oneco, Connecticut area by Appellant Marrapese, Mr. Hennebury, Private Investigator Robert Joyal, Attorneys Andrew Bucci and John O'Neill and their legal secretary. And as to all of the above (1) none of the above occurred on September 29, 1972, (2) there is no evidence of any "force or violence" associated with any of the above, (3) there was no "intimidation" or "influencing" of Daniel LaPolla, nor was there in fact, any contact with him at all, except for the brief glimpse at a distance by Joost on this one occasion where Mr. LaPolla allegedly returned near his home and then immediately left the area again. On each of the occasions that Appellant Marrapese went into the Oneco area he drove his own vehicle, and he and his attorneys identified themselves by their true names, the attorneys leaving their business cards, and stating to each person they questioned in this tiny community of 40-50 persons their request for information concerning the present whereabouts of Daniel LaPolla. The last of such visits into the Oneco, Connecticut area in the immediate vicinity of Daniel LaPolla's home WAS ON SEPTEMBER 27, 1972, ONLY TWO DAYS BEFORE MR. LAPOLLA'S DEATH. On this occasion Appellant Marrapese's conduct in (1) accompanying himself with Attorney O'Neill and the legal secretary, (2) identifying himself by true name and allowing the attorney to leave his business card, (3) interviewing face to face the inhabitants of this tiny community, (4) revealing his purpose to locate and interview Daniel LaPolla, (5) driving his own Cadillac automobile bearing license plates registered to him, and (6) after questioning persons at a gas station very near Mr. LaPolla's house, and at the quarry, then proceeding to the local newspaper office, and finally, (7) purchasing in his own name a bicycle for his 12 year old daughter's birthday, is manifestly completely inconsistent with the conduct of a potential killer surreptitiously stalking his prey! It is respectfully suggested that it is only good common sense that if a person knew either that a bomb was going to be placed in Mr.

LaPolla's house only 2 days later on September 29, 1972, or for that matter, may have already been placed at the house as of this date, September 27, 1972, the very last place that person would want to be seen would be in the neighborhood where the house is located, for the explosion might possibly have occurred on September 27, 1972 while Mr. Marrapese was in the immediate area! A person with any common sense at all would be miles away, in Hawaii perhaps, passing out $100.00 bills as tips to bellhops so that they would remember him, as a possible alibi.

In short, there are no facts to support a conviction as to Counts 2 and 3 of the indictment, and since this is so, then the allegation of 'proximate causation' as set forth in Count 1 fails, there being no evidence that if any such conspiracy did exist that it "RESULTED IN THE DEATH OF DANIEL LAPOLLA."

Count 1

The element required to be proven by the Government was (1) that the named defendants engaged in a conspiracy to deprive Daniel LaPolla of his civil rights and (2) that such conspiracy RESULTED IN THE DEATH OF DANIEL LAPOLLA.

It is strongly contended by the Appellant Marrapese that the only conspiracy in any way arguably proven by the Government was that which allegedly occurred on May 8, 1972 at the so-called meeting at Carter's Jewelry Store at which the named defendants and Attorney Andrew Bucci were present and wherein John Anthony Housand was allegedly hired to shoot Daniel LaPolla for the sum of $5,000.00. [Appellant Marrapese takes great issue with the credibility of John A. Housand, who admitted in his testimony that lieing was his common practice for years while he engaged in misrepresentations, forgeries, and 'con-man' activities (Tr. 550), and strongly contends that the contradictory testimony by a Superior Court Judge (the former Lieutenant Governor of the State of Rhode Island), a State Senator, an Assistant Attorney General, five attorneys and two police officers conclusively proved that no such meeting on

May 8, 1972 ever did occur.] However, for the purpose of this argument, assuming the testimony of John A. Housand to be true, and considering such evidence 'in the light most favorable to the Government,' there was only one conspiracy proven by the Government, and this was the conspiracy wherein on May 8, 1972 John Housand agreed to shoot Daniel LaPolla for $5,000.00. But this specific conspiracy never "resulted in the death of Daniel LaPolla." Following Mr. Housand's falling-out with the defendants, Mr. Housand left the State of Rhode Island on June 13, 1972 without ever having attempted to shoot Mr. LaPolla. This conspiracy, therefore if it ever existed at all, terminated at the latest on June 13, 1972. And on July 15, 1972 Mr. Housand was taken into custody in Arkansas and remained in continuous custody until January 1974, and Mr. LaPolla was killed in the interim on September 29, 1972. The conspiracy to hire Housand to shoot Mr. LaPolla certainly, therefore, did not result in the death of Mr. LaPolla. And the Government offered no evidence of any 'new' conspiracy being entered into after Mr. Housand left the State of Rhode Island. If the Government is claiming that a new conspiracy to kill LaPolla commenced sometime after Mr. Housand left Rhode Island, it was incumbent upon the Government to allege the particulars surrounding that conspiracy in its Bill of Particulars, and to introduce evidence in support of same, and no such evidence was adduced.

THE GOVERNMENT'S ENTIRE CASE IS BUILT UPON PURE SPECULATION. The prosecution read to the jury the indictment for the theft of the M-16 rifles, as well as the indictment in the instant case which sets forth the allegation in Count 1 thereof that Mr. LaPolla was deprived of his civil right to testify against the named defendants at the trial for the theft of the M-16 rifles. THUS, THE GOVERNMENT HAS CAUSED THE JURY TO SPECULATE THAT SINCE THESE NAMED DEFENDANTS ALLEGEDLY HAD THE MOTIVE TO KILL DANIEL LAPOLLA, IN ORDER TO PREVENT HIM FROM TESTIFYING, THEN THEY MUST HAVE BEEN THE ONES, IN FACT, WHO DID KILL HIM! The prosecuting attorney in his closing argument stated to the jury that (Tr. 1605-1606) (A. 30, 31):

> "But when you go into the jury room, you collectively have to try to remember all the facts and the overwhelming consideration which you have before you in the jury room is, first of all, did a man die? Secondly, he died because he was a witness. And third, THERE WERE ONLY FOUR PEOPLE IN THE WORLD WHO HAD A MOTIVE to prevent him from testifying. And when you consider that, you will reach the conclusion and be able to analyze all the other little isolated instances which have been shown to you, and you will be able to understand why these particular incidents took place." (Emphasis added by Appellant Marrapese.)

Next, the Government introduced evidence that Guillette allegedly had some skills in the field of electricity, and had installed a home made burglar alarm system in his home. From this they asked the jury to speculate that Guillette was the one who made the dynamite bomb. At Appellant Marrapese's and co-defendant Zinni's trial, evidence was introduced that three "identifiable" fingerprints were found on the bomb device. The defense had the prosecution fingerprint expert roll Appellant Marrapese's and co-defendant Zinni's fingerprints on sample cards for comparison purposes during the noon recess. Based on a comparison then made, the expert testified that the three "identifiable" fingerprints on the bomb device were not those of either Appellant Marrapese or co-defendant Zinni! The prosecuting attorney stated in his argument to the jury that Guillette had the equipment and the skills, and that the prosecution had never stated that Marrapese or Zinni had made the bomb, but rather that they had functioned in a "managerial" capacity (Tr. 1610-1611) (A. 31). Thus, the jury is asked to speculate (1) that since Guillette had certain electrical skills he must have made the bomb, and (2) that Appellant Marrapese and co-defendant Zinni acted in a "managerial" capacity, that is, that when Guillette allegedly made the bomb he did so as the 'agent' of Appellant Marrapese and co-defendant Zinni. And from this purely conjectural process, the jury are then asked to speculate that

tape recorded conversation that he, Appellant Marrapese, had eight (8) sticks of dynamite, and was going to blow

the defendants or one of them must have placed the dynamite bomb at Daniel LaPolla's house and, therefore, "did use an explosive, to wit, a dynamite bomb, on September 29, 1972." [It should be noted that at the hearing of Joost and Guillette's motion for a new trial, on October 21, 1974, a Government expert testified that neither Joost's nor Guillette's fingerprints were those found on the bomb device (see C.A. 74-2649)].

In order to sell this to the jury, the Government added (1) testimony concerning the various innocent attempts to locate Daniel LaPolla, such as the visits to Oneco and to the wake of Reverend LaPolla in Providence, (2) the testimony of John A. Housand as to the May 8, 1972 meeting (which was conclusively contradicted by a number of most credible defense witnesses) and (3) by the highly prejudicial and inflammatory so-called "prior act or offense" evidence of the tape recorded conversation pertaining to the dynamiting of the Brooklyn, Connecticut Jail. In short, the Government used a "somebody had to have done it and who else had the motive" argument. And this combination of conjecture, speculation, and highly inflammatory, inadmissible evidence resulted in conviction!

Appellant Marrapese respectfully contends, therefore, that even by considering the evidence in 'the light most favorable to the Government,' the Trial Court erred in denying Appellant Marrapese's Preverdict and Postverdict Motions for 'Judgment of Acquittal.'

And certainly the Trial Court ruled erroneously in denying Appellant Marrapese's Motion For A New Trial on the ground that the 'Verdict is Against the Weight of the Evidence.' As stated previously, the Trial Court when considering this motion may weigh the evidence and consider the credibility of witnesses, *United States* v. *Robinson* (supra). And other than the highly inflammatory evidence of the tape recording pertaining in part to the statement of an alleged intention to dynamite the Brooklyn, Connecticut Jail, which was limited as alleged "prior act or offense" evidence, the entire Government case depended upon the testimony of one witness, John Anthony Housand. Appel-

doubt which may have existed in the minds of the jurors as to his complicity in Daniel LaPolla's murder by dyna-

lant Marrapese respectfully, but strongly contends that Mr. Housand's integrity and credibility were satisfactorily impeached (a) by his background of crimes involving dishonesty and misrepresentation, and (b) by promises of benefit, and actual reward by the Government, thus giving him a motive to fabricate, and, (c) by the contradictory testimony of a number of defense witnesses of the utmost integrity and credibility, and therefore, the Trial Court should have granted the Motion For A New Trial.

The Government's principal witness, John Anthony Housand, was an informant without whose testimony concerning an alleged 'conspiratorial' meeting on May 8, 1972 at Carter's Jewelry Store, Cranston, Rhode Island the Government evidence presented would have fallen. There was no other Government evidence presented directly connecting Appellant Marrapese or co-defendant Zinni to Daniel LaPolla, and until Mr. Housand was discovered there was not even sufficient evidence to support an indictment. Appellant Marrapese and co-defendant Zinni strongly contest the credibility, integrity and truthfulness of Mr. Housand, whose bizzare testimony concerning a May 8, 1972 "conspiratorial" meeting was conclusively contradicted and impeached by a number of defense witnesses including a Superior Court Judge (the former Lieutenant Governor of the State of Rhode Island), an Assistant Attorney General in Rhode Island, a State Senator in Rhode Island, four other Rhode Island attorneys, a Superior Court reporter and an investigating officer who was 'Police Officer of the Year' in Rhode Island in 1972.

An analysis of the testimony given by Mr. Housand on both direct and cross-examination, and of the contradictory defense testimony reveals that the verdict was truly against the weight of the evidence and based for the most part on the highly prejudicial tape recording concerning the dynamiting of the Brooklyn Jail! Mr. Housand testified that on Monday, May 8, 1972 at approximately 10:00 A.M. he and co-defendant Guillette arrived at Carter's Jewelry Store, Cranston, Rhode Island, and when they entered Attorney Andrew Bucci of Providence, Appellant Marrapese and co-

defendants Zinni and Joost were already there! (Tr. 338) (A. 34); that at this meeting the defendants allegedly hired him to shoot Daniel LaPolla for $5,000.00, and he agreed (Tr. 342); that the meeting lasted approximately 15 minutes (Tr. 345, 414) (A. 35); that he and Guillette then went back to Guillette's house in Providence, where they spent the rest of the day (Tr. 421); that this very evening Guillette and Mr. Housand went from Providence to Woonsocket, Rhode Island to a location where one Edward Sitko gave a gun to Mr. Housand in Guillette's presence (Tr. 347) (A. 36); that on May 10, 11 and 12, 1972 Mr. Housand was questioned first by members of the Lincoln, Rhode Island Police Department, and then by F.B.I. agents, initially at the Lincoln Police Station, and later at F.B.I. headquarters (Tr. 368) in Providence, pertaining to Mr. Housand's arrest with co-defendants Joost and Guillette two weeks before on April 27, 1972 by the Lincoln Police Department for possession of burglar tools (Tr. 304); that on May 10, and 11, 1972 he was told by the Lincoln Police Department Chief of Police and a Captain that they wanted him to tell them everything he knew about the alleged criminal activities of Joost and Guillette, and if he did not give them this information they would not prosecute him for the possession of burglar tools, but if he did not tell them, he would be prosecuted; that he and certain other persons also had passed fraudulent American Express Money Orders in Rhode Island, Massachusetts and Connecticut shortly after arriving in Rhode Island from North Carolina on April 18, 1972 (Tr. 365) (A. 37), and the F.B.I. agents told him that he would not be prosecuted for his participation in this Interstate Transportation and Uttering of the fraudulent money orders if he would tell them everything he knew about the alleged criminal activities of co-defendants Joost and Guillette (Tr. 371) (A. 37); that he told both the F.B.I. and Lincoln Police on May 11 and 12, 1972 what he knew about Joost and Guillette in order to avoid being prosecuted (Tr. 372) (A. 38), but he conceded on cross-examination that he did not mention anything about any alleged "conspiratorial" meeting which supposedly took place only

three days earlier, wherein he was allegedly hired by defendants to shoot Mr. LaPolla for $5,000.00! (Tr. 372, 373) (A. 38, 39); that he had a falling-out with the defendants shortly thereafter (Tr. 444), and on May 23, 1972 he received a severe beating by one Rickie Cochran in co-defendant Guillette's presence and at Guillette's direction (Tr. 445) (A. 40), and was hospitalized with three broken ribs and a fractured cheekbone (Tr. 445); that while in the hospital on May 23 (Tr. 445), he was visited by an F.B.I. Agent who told him that they wanted him to tell them anything else he knew about the activities of Joost and Guillette (Tr. 446) (A. 41) and that if he did not, he was going to be prosecuted for the Federal offense of interstate transportation of stolen money orders, for conspiracy, and also possession of burglar tools (Tr. 446) (A. 41). He admitted on cross-examination that he was very angry with Guillette, and he was hurting physically and he expressed his anger at Guillette to the F.B.I. agent (Tr. 446), only 15 days after the alleged "conspiratorial" meeting with the defendant which supposedly took place at Carter's Jewelry Store, but he did not even mention this meeting to the F.B.I. agent! (Tr. 447) (A. 54). Mr. Housand testified that he left Rhode Island on June 13, 1972 without having carried out his alleged mission to shoot Mr. LaPolla, and on July 15, 1972 he was arrested in Fayetteville, Arkansas on an unrelated charge arising out of North Carolina (Tr. 361) and remained in continuous custody from then until April 1974 when he was eventually paroled (Tr. 361). On April 15, 1973, some eleven months (Tr. 350) following the alleged "conspiratorial" meeting, while in custody in North Carolina (Tr. 350), Mr. Housand was visited by A.T.F. Agents Fowler and Watterson (Tr. 362). Mr. Housand testified that from 1965 up through the first time he spoke with A.T.F. Agents Fowler and Watterson in April 1973 with the exception of a few months he had been in almost continuous custody for eight years (Tr. 359) (A. 43) and had just been sentenced to an additional six years (Tr. 359, 360) (A. 43, 44). These prior convictions included forgery in Omaha, Nebraska in 1965 (Tr. 351), Forgery and Escape

in Lincoln, Nebraska, 1968 (Tr. 353), Interstate Transportation of Stolen Vehicles in North Carolina (Tr. 356), and in January 1973 three convictions for forgery and uttering for which he was sentenced to six additional years (Tr. 359). All of his convictions concerned misrepresentations and lying (Tr. 453, 550) (A. 44, 45) and using aliases such as John Smith, Charles Kirby, John Joseph Howard, Stephen Longvall and Marvin Dunkle, etc. (Tr. 353) (A. 45). He agreed that when the A.T.F. Agents first talked to him in April 1973 he wanted out of jail very badly (Tr. 359, 360) (A. 44). Mr. Housand was promised by the Federal Agents that if he cooperated with them that they would request the United States Attorney to appear on his behalf before he parole board (Tr. 363). Mr. Housand agreed to cooperate and signed a statement for the A.T.F. Agents on April 19, 1973 (Tr. 378, 447) but nowhere in this statement is there any mention of this alleged May 8, 1972 "conspiratorial" meeting, at which Attorney Bucci and the defendants allegedly were present (Tr. 448) (A. 43).

Mr. Housand further admitted that when he testified before the Federal Grand Jury in Hartford, Connecticut, in this regard on May 2, 1973 that he did not mention that Attorney Andrew Bucci was present at this alleged "conspiratorial" meeting on May 8, 1972. (Tr. 449) (A. 36). When Mr. Housand came to Connecticut prior to testifying before the Federal Grand Jury in May 1973, he met with Assistant United States Attorney Paul Coffey, who promised him immunity from prosecution for any and all crimes he committed in Rhode Island and Connecticut (Tr. 364) (A. 47), including possession of burglar tools (Tr. 371), conspiracy, interstate transportation and uttering of stolen money orders (Tr. 366), a house burglary he committed just before he left Rhode Island (Tr. 367), and for any alleged participation in this LaPolla case (Tr. 364). Mr. Coffey also promised him that he would appear on his behalf before the Parole Board in North Carolina (Tr. 364) (A. 47), and Mr. Coffey did, in fact, appear, and at the time of Mr. Housand's testimony in June 1974 he had already been released on parole (Tr. 364) (A. 47).

Mr. Housand also received approximately one thousand dollars from the Government while he was in prison between April 1973 and April 1974, some in cash by A.T.F. Agent Petrella (Tr. 374) (A. 48) and had a running account of approximately $85.00 per month at the commissary for toilet articles, etc., and upon his parole in April 1974, he received an additional $2,160.00 for relocation expenses (Tr. 375) (A. 48).

In addition, Appellant Marrapese respectfully, but most strongly, urges that Mr. Housand's story of an alleged 'conspiratorial' meeting on the morning of May 8, 1972 was conclusively proven false by the contradictory testimony of the most credible defense witnesses, and that Appellant Marrapese's conviction was due in its entirety to the prejudicial effect of the highly inflammatory and inadmissible evidence of the tape recorded conversation pertaining to the alleged declaration of intention of Appellant Marrapese to dynamite the Brooklyn, Connecticut Jail!

As stated previously, Mr. Housand testified that on Monday morning, May 8, 1972, he and co-defendant Guillette traveled from Guillette's house in Guillette's vehicle to Carter's Jewelry Store, Cranston, Rhode Island, arriving at approximately 10:00 a.m. (Tr. 413, 530, 531) (A. 33, 34), and Attorney Andrew Bucci, Appellant Marrapese, and co-defendants Joost and Zinni were already there when he arrived! (Tr. 338) (A. 35). The meeting lasted approximately 15 minutes (Tr. 345, 414) (A. 36) and then he and Guillette returned to Guillette's house (Tr. 421).

Testimony by a number of defense witnesses conclusively established that Attorney Andrew Bucci could not possibly have already been at Carter's Jewelry Store in Cranston, Rhode Island at 10:00 a.m. and for the 15 minute meeting thereafter, as Mr. Housand claimed in his testimony, and for the approximate 15 minute drive thereafter from Carter's Jewelry Store in Cranston to downtown Providence, since Mr. Bucci was in Providence Superior Court from shortly before 10:00 a.m. until shortly after noontime when he then went to lunch with another attorney!

In addition, according to defense testimony, Appellant Marrapese and co-defendant Zinni were also present at the Providence Superior Courthouse during this same approximate period of time. [All of the defense witnesses were excluded from the Courtroom by Government motion so that they could not listen to each other's testimony (Tr. 1020-1031) (A. 49)]. [It should also be noted that at the trial of co-defendants Joost and Guillette, the prosecutor, Mr. Coffey, argued to the jury that there was a sufficient gap in the time for Attorney Bucci and the defendants to have traveled from the Superior Courthouse to Carter's Jewelry for the 15 minute meeting and return to the courthouse between 10 A.M. and 12 noon. When the evidence presented at the trial of Marrapese and Zinni accounted for the time between 10 A.M. and 12 noon to the point where no sufficient gap in time existed for this round trip and meeting, the same prosecutor, Mr. Coffey, then switched his attack and argued to the jury that the meeting occurred either before 10 A.M. or 12 noon!]

The defense witnesses testified to the true facts as they occurred on Monday morning, May 8, 1972.

(A) There was a pre-trial conference in the chambers of Superior Court Judge John S. McKiernan at which Attorney Andrew Bucci and several other attorneys were present from the beginning of the conference until its conclusion, [Judge McKiernan (Tr. 1086, 1095) (A. 50, 51); Assistant Attorney General Edward Mulligan (Tr. 1138); Attorney John Sheehan (Tr. 1126); Attorney John Kelly (Tr. 1100); Attorney Carmine Rao (Tr. 1110, 1113).]

(B) This 'in-chambers' conference commenced around 10:00 A.M. or within a few minutes thereafter. [Judge McKiernan testified 'around 10:00 o'clock' (Tr. 1094-1095) (A. 50, 51); Attorney Bucci testified he walked from his office to the Courthouse 1½ blocks away with Attorney John O'Neill arriving at Judge McKiernan's chambers 'just prior to 10:00 A.M.' (Tr. 1241) (A. 52), and they entered the Judge's chambers shortly before 10:00 A.M. (Tr. 1242-1243) (A. 52, 53). However, they immediately

exited since the prosecuting attorney, Assistant Attorney General Edward Mulligan had not yet arrived (Tr. 1242) (A. 52) and when Mr. Mulligan and Attorney Carmine Rao arrived a short time later, they all entered the judge's chambers and the conference began (Tr. 1243) (A. 53); Attorney John Kelly testified that when he arrived at approximately 10:15 A.M. he believes the conference had already started (Tr. 1104) (A. 55); Attorney John Sheehan testified that he arrived at the Judge's chambers at approximately 10:10 A.M. and the conference had already started and the other attorneys including Mr. Bucci were already present (Tr. 1125-1126) (A. 56, 57); Providence Police Officer Julio Fuina, the investigating officer testified that he arrived at Judge McKiernan's courtroom at 10:10 A.M. (Tr. 1024) (A. 57). He did not see the attorneys enter the Judge's chambers, but no one entered after he arrived, and he saw all the attorneys, including Mr. Bucci exit from the Judge's chambers about 15 minutes before jury selection began, which commenced at exactly 11:35 A.M. (Tr. 1048) (A. 57)].

(C) The 'in-chambers' conference concerned the question as to which of the several defendants, including appellant Marrapese and co-defendant Nicholas Zinni, were going to go to trial that morning, and on which of a number of indictments (Tr. 1090, 1095) (A. 51). Also, Attorney Andrew Bucci informed Judge McKiernan, in chambers, that he wished to move for a continuance on behalf of Appellant Marrapese and co-defendant Zinni due to the prejudicial publicity in the Rhode Island newspapers over the weekend concerning their arraignment the previous Thursday, May 4, 1972 in Hartford, Connecticut on charges relating to the theft of the M-16 rifles from the Westerly armory (Tr. 1089, 1244-1211). One case was selected for trial, *State* v. *Robert Giorgi*, who was represented by Attorney Carmine Rao (Tr. 1109, 1250) (A. 62).

(D) The 'in-chambers' conference terminated around 11:00 to 11:15 A.M. or thereabouts. [Providence Police Officer Julio Fuina testified that he saw the attorneys,

including Andrew Bucci, exit from Judge McKiernan's chambers approximately 15 minutes or so before the jury selection process began, which commenced at exactly 11:35 A.M. (Tr. 1048) (A. 57). He also stated that the conference ended approximately forty-five minutes to an hour after he first arrived at the courtroom at 10:10 A.M. (Tr. 1025-1026) (A. 58). Attorney John Sheehan—testified that the conference ended between 11:15 and 11:30 A.M. (Tr. 1127) (A. 78); Attorney John Kelly—the conference ended at approximately 11:00 A.M. (Tr. 1105) (A. 56); Attorney Andrew Bucci—it ended at approximately 11:00 A.M. (Tr. 1254-1255).]

(E) Following the termination of the conference, all of the attorneys left the judge's chambers and walked out into open court, and there was a few minutes delay while the stenographic reporter, Paul Rocheleau, pursuant to a telephone call from Judge McKiernan, traveled from his office on the fourth floor to Judge McKiernan's courtroom on the fifth floor, [Paul Rocheleau (Tr. 1068) (A. 60), Andrew Bucci (Tr. 1249) (A. 61).] Attorneys Andrew Bucci, John O'Neill, Carmine Rao and Assistant Attorney General Edward Mulligan remained in the courtroom. The other attorneys left and presumably went to their offices.

(F) After Paul Rocheleau, the stenographic reporter arrived at Judge McKiernan's courtroom, Attorneys Andrew Bucci and John O'Neill, and Assistant Attorney General Edward Mulligan argued a motion to continue the cases of Appellant Marrapese and other co-defendants to another trial date due to the unfavorable publicity over the weekend concerning their arraignment the previous Thursday, May 4, 1972 in Hartford on the charges involving the theft of the M-16 rifles. (Tr. 1068, 1248). The motions were stenographically recorded and took 10 minutes (Paul Rocheleau—Tr. 1073, 1074) (A. 63). The transcript of this motion was admitted into evidence as Defendants' R (Tr. 1375) and contains the argument made by Attorney Andrew Bucci thereon (Tr. 1084-1085) (A. 63,

64). The motion to continue by Mr. Bucci and Mr. O'Neill was granted by the Court. (Tr. 1250).

(G) After the motion to continue was granted, the Court took an approximate 5 minute recess (Paul Rocheleau—Tr. 1071) (A. 64). Attorney Andrew Bucci testified that during this brief recess he left the courtroom of Judge McKiernan and walked to the nearby courtroom on the same floor of Judge William McKenzie and withdrew his appearance on behalf of another defendant, Richard Harris, in an unrelated case (Tr. 1250) (A. 64, 65). He had to obtain Judge McKenzie's approval in writing in order to withdraw his appearance. He spoke personally with Judge McKenzie, who gave his approval in writing on the 'Motion To Withdraw Appearance' forms (Tr. 1251) (A. 65). These forms, dated May 8, 1972 and bearing Judge McKenzie's signature were marked for identification purposes as exhibits U and V. (Tr. 1319). Attorney Bucci arrived back in Judge McKiernan's courtroom just prior to commencement of jury selection in the case of *State* v. *Robert Jorgi* and sat on the opposite side of the room from the prospective jurors, next to defense counsel's table (Tr. 1252) (A. 66). Carmine Rao, defense counsel for Robert Jorgi, also testified to Attorney Bucci's presence at this location in the courtroom when jury selection commenced for the Jorgi trial (Tr. 1113) (A. 67).

(H) Jury selection commenced exactly at 11:35 A.M. and Attorney Andrew Bucci was present in Judge McKiernan's courtroom. Providence Police Detective, Julio Fuina, the investigating officer on the *State* v. *Robert Jorgi* case, a veteran of the Providence Police Department for 20 years (Tr. 1019) (A. 80), and named 'Policeman of the Year' in 1972 (Tr. 1040) (A. 68) testified that he was present in Judge McKiernan's courtroom on the morning of May 8, 1972, and sat next to the prosecutor, Edward Mulligan, at counsel table during jury selection and the trial (Tr. 1030, 1035) (A. 69). [Jury selection was very rapid, the attorneys accepting the first twelve jurors called (Tr. 1142).] At that time, Detective Fuina recorded the exact

time that jury selection commenced, 11:35 A.M., and the exact time that jury selection ended, 11:52 A.M., on one of the jury lists that he had in his possession at that time (Tr. 1035) (A. 70). This jury list bearing these notations was admitted into evidence as defense exhibit Q. (Tr. 1045) (A. 71). Detective Fuina testified that he not only saw Attorney Bucci exit with the other attorneys from Judge McKiernan's chambers (following the in-chamber's conference which ended at approximately 11:00 to 11:15 A.M. (Tr. 1025-1026) (A. 58) (Tr. 1948) (A. 57), but also that Attorney Bucci was seated in Judge McKiernan's courtroom next to the defense table when jury selection began at 11:35 A.M. (Tr. 1036) (A. 70), and that he was still seated there after the jury was finally selected at 11:52 A.M. (Tr. 1049-1059) (A. 71, 72). Attorney Bucci testified that he remained in the courtroom until just before the noon recess and then had lunch with Robert Jorgi's attorney, Carmine Rao (Tr. 1254) (A. 73); (Tr. 1255) (A. 80).

(I) And concerning the presence of Appellant Marrapese and co-defendant Zinni in the Providence Superior courthouse on the morning of May 8, 1972 between 10 A.M. and noontime, several witnesses so testified. Attorney John Kelly testified that he saw defendant Zinni in the corridor outside Judge McKiernan's courtroom when he first arrived between 10:00 and 10:15 a.m. (Tr. 1103, 1104) (A. 55), and saw both Appellant Marrapese and co-defendant Zinni in this same corridor when the 'in-chambers' conference ended at approximately 11:00 - 11:15 A.M. (Tr. 1102, 1103) (A. 73). Assistant Attorney General Edward Mulligan testified that he also saw Appellant Marrapese outside the courtroom sometime that morning (Tr. 1143, 1144) (A. 74). Detective Fuina testified that he held a conversation with both Appellant Marrapese and co-defendant Zinni and several other persons in the hallway outside Judge McKiernan's courtroom between the time he first arrived at 10:10 A.M. and approximately 15 minutes before jury selection began at 11:35 a.m. (Tr. 1026-1027) (A. 75); (Tr. 1057-1058) (A. 75, 76). Attorney John Sheehan testi-

fied that he believes he saw both Appellant Marrapese and co-defendant Zinni that morning at the courthouse (Tr. 1127) (A. 77). And Attorney Andrew Bucci testified that he saw both Appellant Marrapese and co-defendant Zinni at the courthouse when the 'in-chambers' conference ended at approximately 11:00 A.M. (Tr. 1244, 1245) (A. 77); (Tr. 1254-1255) (A. 60).

(J) In addition, A.T.F. Agent Frederick Connel (Tr. 988) testified that on the morning of December 18, 1972 he and his partner, in an automobile, made two round trips from the Providence County Superior Courthouse in Providence, from the front and rear entrances respectively, to Carter's Jewelry Store, in Cranston, and return, and timed each trip. (Tr. 993-1001). The trips were made between 10:00 and 11:00 A.M. as requested by A.T.F. Agent James Watterson (Tr. 1001) (A. 75, 76). The trips from the Providence Superior Courthouse to Carter's Jewelry Store took approximately 15 minutes each (Tr. 994) (A. 76); (Tr. 1001) (A. 75, 76). The return trips from Carter's Jewelry Store to the Courthouse were at a faster speed, in excess of 50 miles per hour, and slightly different route, and took approximately 11 minutes each (Tr. 997). Therefore, in order for Attorney Andrew Bucci and Appellant Marrapese and co-defendant Zinni to make the 15 minute trip from the Providence Superior Courthouse to Carter's Jewelry Store in Cranston, stay for an alleged 15 minute "conspiratorial" meeting and make the 11 minute return trip to the Providence Superior Courthouse, would require a lapse of time of approximately 41 minutes. (Just the 15 minute meeting plus the 11 minute trip to the Providence Superior Courthouse from Carter's Jewelry Store requires a lapse of time of 26 minutes.) And this 41 minute lapse would be much longer when it is also taken into consideration that A.T.F. Agent Connell drove from directly in front of the Providence Superior Courthouse entrance (Tr. 993, 998), (rather than having to exit from the Courthouse and walk several hundred feet to the nearby parking lot (Tr. 1003) and pay the attendant, etc.,

or walk the 1½ blocks to Attorney Bucci's office in order to obtain an automobile), plus, enroute he encountered seven green lights in a row (Tr. 997, 999) (A. 78), and no one was at either of the two pedestrian stop signs on either trip (Tr. 997, 999) (A. 78, 79). It is immediately obvious in analyzing the testimony given by the defense witnesses above, that nowhere between shortly before 10:00 A.M. until after noontime is there any 41 minute (or even a 26 minute) lapse of time when Attorney Andrew Bucci was not present either in Judge McKiernan's chambers, or his courtroom, or in Judge McKenzie's courtroom. Accordingly, Mr. Housand's testimony that Attorney Bucci was already at Carter's Jewelry Store in Cranston when Mr. Housand allegedly arrived with Guillette around 10:00 A.M. and remained there for a 15 minute "conspiratorial" meeting has been conclusively contradicted and outweighed by the testimony of these most credible defense witnesses! Further, the evidence indicated that all attorneys and defense counsel were informed on Monday, May 1, 1972 that the trial date was set for Monday morning, May 8, 1972, and it is completely illogical, therefore to assume that a 'conspiratorial' meeting would be scheduled for this same date and time, (and to be held at an alleged business establishment, Carter's Jewelry Store, which the evidence later revealed was no longer in existence as such on that date).

Appellant Marrapese respectfully contends, therefore, that his conviction was due in its entirety to the highly projudicial and inflammatory tape recording concerning the alleged declaration of intention to dynamite the Brooklyn, Connecticut Jail, and that the Trial Court committed error in its weighing of the evidence and the credibility of the witnesses, and in its ruling denying Appellant Marrapese's Motion for a New Trial on the ground that the verdict is against the weight of the evidence, and further, that such judicial error deprived the appellant of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

II. The Trial Court's Ruling, Admitting Into Evidence Certain Tape Recordings and Their Contents and Written Transcriptions Thereof, Deprived the Appellant Marrapese of His Guarantees Pursuant to the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

During the prosecution's case-in-chief and just prior to the testimony of the prosecution's main witness, John Anthony Housand, the Government introduced into evidence, after a voir dire hearing, and over defense objection (Tr. 177) (A. 79) a tape recording, Government Exhibit Number 34 (Tr. 179). Portions of this tape recording were then played to the jury in open court. Each juror was furnished by the Government, over defense objection (Tr. 177), with a typewritten transcription, Government Exhibit Number 35, (Tr. 179) of that portion of the tape recording which was to be played, and the jurors read along from these typewritten transcriptions while the tape recording was being played. (Tr. 188-190). After all defense objections had been overruled, the Court was requested by the defense to instruct the jury as to the limited purpose for which the Government was offering the tape, state of mind, etc., but the Court refused (Tr. 189) (A. 84). Appellant Marrapese respectfully contends that the prejudicial impact of this tape recording was so overwhelming that it immediately and irrevocably deprived him of any possibility of receiving a fair trial by an impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution!

The very heart of the prosecution's case at the trial was that Appellant Marrapese conspired and performed certain acts alone and with others which eventually resulted in the murder of Daniel LaPolla, a prospective Government witness, by the use of dynamite on September 29, 1972. And the very heart of the content of the most prejudicial portion of the tape recording, which was played to the trial jury, was to the effect that the Appellant Marrapese in March, 1972, approximately six (6) months before Daniel La-

Polla's death, allegedly stated to Mr. LaPolla during this tape recorded conversation that he, Appellant Marrapese, had eight (8) sticks of dynamite, and was going to blow up the entire jail at Brooklyn, Connecticut, including all of its occupants, in order to murder some other person, inferentially, another Government witness. Certain portions from the entire tape recording were selected by the prosecution to be played to the jury:[1]

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[1] "William Marrapese: You know where the Brooklyn Jail is?
Daniel La Polla: Yeah, I know where it is. Why?
William Marrapese: (unclear) jail is (unclear)
Daniel La Polla: Cracker box.
William Marrapese: (unclear) soft?
Daniel La Polla: Sure.
William Marrapese: How far is it from your house?
Daniel La Polla: (unclear) Have you ever been to Danielson, Cannecticut?
William Marrapese: That's what I said, near a rotary. (unclear) The old road to New York.
Daniel La Polla: Yeah. You know how big the school is on (unclear) street used to be. I'm just telling you the school, you know how big that used to be.
William Marrapese: (unclear) street school.
Daniel La Polla: Yeah.
William Marrapese: How big in comparison to (unclear)
Daniel La Polla: (unclear) How many cells? It isn't big. That's all.
William Marrapese: A big city block.
Daniel La Polla: It's like a big apartment house, Billy. It's like a big apartment house, like about four or five stories high, and maybe about two lots, no more than two or three lots (laughing). Your kidding? Let me know, so I can (unclear).

* * * * *

Daniel La Polla: (unclear) Hey, Billy, you trying to get rid of the rat population up there?
William Marrapese: Yeah (unclear).
Daniel La Polla: Ahh. Who's up there?
William Marrapese: Huh?
Daniel La Polla: WHO'S UP THERE?
William Marrapese: THEY GOT ALL KIND OF WITNESSES (unclear)
Daniel La Polla: Up there!
William Marrapese: (unclear) That big nose. JUST ONE, ONE NIGHT THE WHOLE PLACE IS GOING TO GO TO HEAVEN.
Daniel La Polla: Ahh. That thing that — ahh.
William Marrapese: Yeah.
Daniel La Polla: THEY GOT HIM UP THERE?
William Marrapese: WE FIGURE IF THE WHOLE JOINT GOES, WE'RE GUARANTEED TO GET HIM."

Appellant Marrapese respectfully contends, that any doubt which may have existed in the minds of the jurors as to his complicity in Daniel LaPolla's murder by dynamite, would be immediately dispelled once the jury was made aware that only six months earlier the Appellant Marrapese allegedly stated his intention to murder another alleged Government witness by this same method, the use of dynamite!

The highly inflammatory nature of this evidence becomes even more obvious when one considers that it entails the potential homicide of perhaps several hundred persons, including prisoners and guards alike, at the Brooklyn, Connecticut jail!

In addition, the conversation heard by the jury when the tape recording was played allegedly included not only the voice of the Appellant Marrapese but also that of the now deceased Daniel LaPolla, somewhat akin to the expression "like a voice from the grave."

The conversation allegedly between Appellant Marrapese and Daniel LaPolla on the tape recording did not reveal the identity of the person who was by inference some other Government witness at the Brooklyn Jail. However, this unidentified person could not have been a potential witness for the instant trial of Appellant Marrapese for the death of Daniel LaPolla since Mr. LaPolla was obviously alive at the time and participating in the tape recorded conversation. And there was no evidence offered to show any connection or relationship of the Brooklyn Jail witness with the death of Daniel LaPolla, or that he was a potential witness concerning the theft of the M-16 rifles.

"Daniel La Polla: Aw, that's easy. But let me know, so my ears, you know, cause I'm only a stone's throw away from the joint.
William Marrapese: Oh, you'll hear it.
Daniel La Polla: Guarantee?
William Marrapese: Eight sticks (unclear)
Daniel La Polla: Oh, yeah.
William Marrapese: (banging sound) That's what's you'll hear, Dan.
Daniel La Polla: Hurt my eardrums (unclear)."
[Emphasis added by Appellant Marrapese.]

Appellant Marrapese respectfully contends, therefore, that the prejudicial effect of this evidence tremendously outweighed its probative value and that, therefore, under the law and the unique facts and circumstances of this case, the Trial Court's ruling admitting the content of this tape recording into evidence was reversible error.

Apparently, the Government's theory of admissibility is that this is evidence of a 'prior act or offense.' The Appellant Marrapese agrees that there is a well established practice in the Courts throughout the United States, including the Court of Appeals for the Second Circuit, allowing the admission into evidence of prior similar acts, including crimes, when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. *United States* v. *Deaton*, 381 F.2d 114, 117 (2nd Circ. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2nd Circ. 1966); *United States* v. *Kaplan*, 416 F.2d 103, 104 (2nd Circ. 1969); *United States* v. *Bradwell*, 388 F.2d 619, 622 (2nd Circ. 1968).

However, Appellant Marrapese respectfully contends that under the law and the facts of the instant case this evidence was inadmissible for several reasons.

(A) The alleged statements of Appellant Marrapese DID NOT CONSTITUTE an illegal act, nor the commission of a 'PRIOR OFFENSE' or crime, but perhaps, arguendo, a mere declaration of intention, or possible threat at best.

(B) Applying the so-called 'Balancing Test' set forth in *United States* v. *Bradwell*, 338 F.2d 619 (2nd Circ. 1968) and other cases,

(1) the proof offered by the Government of the alleged commission of any so-called 'prior offense' was NOT PLAIN, CLEAR, CONVINCING, and CONCLUSIVE, but was, rather, of a vague and uncertain character, if anything at all,

(2) the defense did nothing to "PUT IN ISSUE" or "SHARPEN ANY ISSUE" in the case, thereby CREATING ANY "NECESSITY" for the Government's

use of this evidence during the trial of this case under any of the recognized exceptions to the general rule of inadmissibility of prior offenses, such as motive, intent, identity, possibility of accident or mistake, common scheme or plan, etc.,

(3) there was No "ACTUAL NEED" for the Government's use of this evidence, since there was ample "OTHER EVIDENCE" available to the prosecution bearing on these same issues, and

(4) the PROBATIVE VALUE of the evidence was so tremendously OUTWEIGHED BY ITS "PREJUDICIAL CHARACTER," that unquestionably the jury would "be roused by the evidence to overmastering hostility," thereby depriving the Appellant Marrapese of his right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution.

(C) The initial obtaining of the tape recording by the Government was accomplished in such a manner as to violate the Appellant Marrapese's constitutional guarantees pursuant to the Fourth, Fifth and Ninth Amendments to the United States Constitution.

Concerning (A) above, the Appellant Marrapese respectfully contends that the alleged declarations and utterances do not constitute an illegal act, prior offense or crime, but rather, if anything at all, might arguably be categorized as a mere declaration of intention or threat. During the trial there was no proof offered by the Government that any act of dynamiting of the Brooklyn Jail actually occurred or was ever attempted, nor of any agreement legally constituting a criminal conspiracy to commit such an offense. Nor can these declarations be construed to be admissions or a confession in the instant case involving the death of Daniel LaPolla by the use of dynamite, for the obvious reasons that the tape recorded conversation in March 1972 preceded by approximately six months the death of Mr. LaPolla in September 1972. Further, there was no evidence offered by the Government showing any relationship or connection between the utterances concerning the

alleged Brooklyn Jail 'witness' and Mr. LaPolla as a potential witness in the M-16 rifle case. The evidence indicated a complete lack of awareness by the Appellant Marrapese at that time that Mr. LaPolla was surreptitiously acting as a Government informant. And Appellant Marrapese respectfully alleges that mere declarations of intention or threats are not admissible in evidence under the law pertaining to 'prior acts, offenses or crimes.'

In *Commonwealth* v. *Kluska,* 3 A.2d 398 (1939—Pa.) the Court ruled that the making of a threat to kill the mother and sister of the deceased wife was inadmissible at the trial for the murder of the wife, since the making of a threat to commit a collateral offense is inadmissible. *Wiley* v. *State,* 324 SW. 2d 862 (1959—Texas) concerned a burglary prosecution wherein the prosecution offered proof that the defendant committed the break with the intention of obtaining a rifle in order to commit other burglaries. The Court ruled that the evidence of an intention to commit other offenses is not admissible.

Even in situations wherein an actual attempt to commit a prior crime is offered by the Government the Courts have ruled such evidence inadmissible. In *People* v. *Whalen,* 160 P.2d 560 (1945), a rape prosecution, wherein repeated prior attempts at rape were offered by the Government at the trial, the Court, relying on *People* v. *Glass,* 158 Cal. 650, 112 P. 281, 293 (1910) ruled the evidence inadmissible, stating that "the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury." In *State* v. *Atkenson,* 285 SW.2d 563 (1965—Mo.) the Government introduced evidence of first attempts at child molesting at the trial for the performing of the act. The Court in ruling stated that "the rule of exclusion to which we have referred extends to proof of threat, intention or willingness on the part of the accused to commit another crime."

Concerning (B) above, that is, by applying the so-called 'Balancing Test' set forth in *United States* v. *Bradwell,* 338 F.2d 619 (2nd Circ. 1968) the Appellant Marrapese

respectfully contends that the evidence of the tape recording offered as a 'prior act' or 'prior offense' was inadmissible on several grounds. In the *Bradwell* case this Honorable Court stated as follows:

> "...we hold rather that evidence of another crime may be admitted if it is substantially relevant for some purpose than to show a probability that the defendant committed the crime on trial because he is a man of criminal character, with admission to depend upon the trial judge's appropriately balancing on the one side the ACTUAL NEED for the other crimes evidence, in light of the issues, and the OTHER EVIDENCE AVAILABLE to the prosecution; the convincingness of the evidence that the OTHER OFFENSES WERE COMMITTED and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue; and on the other side, the DEGREE TO WHICH THE JURY WILL PROBABLY BE ROUSED by the evidence to overmastering hostility." (Emphasis added).

Initially, as stated in (B) (1) above, the Appellant Marrapese respectfully contends that the proof offered by the Government of the alleged commission of any so-called 'prior act or offense' was not plain, clear, convincing and conclusive, but was, rather, of a vague and uncertain character, if anything at all. In this regard, the Government took various 'selected' excerpts from the entire tape recording and played only these 'selections,' one immediately following the other, for the jury to hear while they read along from a typewritten transcript. This methodology created a 'word picture' basing inference upon inference. The identity of the person in the Brooklyn Jail, who was the alleged target of such bombing was never established, nor that he was a potential Government witness in any particular case, against any particular defendant, if indeed he was to be a witness at all. And, from this sketchy evidence, the Government argues that the utterances constitute 'a prior similar act' to dynamite another potential

Government witness against the Appellant Marrapese, without any clear and convincing foundation in fact. In the case of *Labiosa* v. *Government of the Canal Zone,* 198 F.2d 282 (5th Circ. 1952), during a defendant's trial for statutory rape, the Government's counsel cross examined the defendant as to conversations with a police officer in which defendant allegedly informed the police officer of his techniques for prior statutory rapes. The defendant denied having made any such statements to the officer. The Trial Court allowed the police officer to take the stand and confirm that the statement, which was recited by Government's counsel, was made by the defendant. The Government contention was that this statement to the officer constituted evidence of 'prior similar acts.' The Court on appeal ruled that it was error to allow proof of a 'prior similar act' by the recitation of some statements allegedly made by the defendant. In finding this proof insufficient, the Court set down the standard to which proof of a 'prior similar act' must be held when it stated at page 285:

> "Nevertheless, recognizing the danger inherent in such proof that the defendant may, in fact, be improperly prejudiced by the confusion of issues, or the likelihood that the jury may illogically assume that since the defendant committed one offense he may well, for that reason alone, be guilty of another, it is required that the proof of such similar offense be clear and that evidence of a vague and uncertain character regarding such an alleged offense should not be admitted."

The case of *Kraft* v. *United States,* 238 F.2d 794 (8th Circ. 1956) elaborated on the clear proof test stated in *Labiosa* (supra). And, in *United States* v. *Spica,* 413 F.2d 129 (8th Circ. 1969) the Court stated at page 802:

> "In cases falling under such an exception to the rule (question of intent), however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear

> and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible."

This strict requirement for the proof of a 'prior similar act' is also noted in McCormick, *Evidence,* Section 190 at pages 451, 452 (1972):

> "In the first place, it is clear that the other crime, when it is found to be independently relevant and admissible, need not be established beyond a reasonable doubt, either as to its commission or as to defendant's connection therewith, but for the jury to be entitled to consider it there must of course be substantial evidence of these facts and some courts have used the formula that it must be 'clear and convincing'. And it is believed that before the evidence is admitted at all, this factor of the substantial or unconvincing quality of the proof should be weighed in the balance."

Concerning (B) (2) above, the Appellant Marrapese respectfully contends, that at the time during the prosecution's case-in-chief, when the Government offered into evidence the tape recording and the transcription of certain excerpts therefrom, followed by the playing of such excerpts to the jury, this evidence of an alleged 'prior act or offense' was not then admissible under any of the recognized exceptions to the general rule of inadmissibility, such as motive, identity, intent, lack of accident or mistake, common scheme or plan, etc., nor, had the defense "put in issue" or "sharpened any issue" in the case, thereby causing or creating any "actual need" for the use of this evidence either during the prosecution's case-in-chief or in rebuttal. In fact, during the prosecution's presentation of its evidence in its case-in-chief, and before the tape recording was offered by the Government and admitted into evidence by the Court, the Defense and the Prosecution stipulated in the jury's presence (a) that Daniel LaPolla was killed by the use of a dynamite bomb, and (b) that Daniel LaPolla did not commit suicide, did

not die by accident, and did not place the explosive device which killed him (Tr. 84) (A. 80). Further, over defense objection (Tr. 5) the indictment concerning the theft of the M-16 rifles was read in its entirety to the jury by the Prosecution (Tr. 7-11) (A. 25), alleging that the named defendants, including Appellant Marrapese, did conspire with Daniel LaPolla, and setting forth certain overt acts, but not naming Daniel LaPolla as a co-defendant. The prosecution's intention in reading this was to indicate to the jury, that when the defendants were arraigned on this indictment on May 4, 1972, they then became aware that Daniel LaPolla was obviously a Government informant against them in the M-16 gun case, and thus, they had a motive to kill him. This evidence bears directly on the issues of motive, identity and intent. And following the tape recorded evidence concerning the dynamiting of the Brooklyn Jail, the prosecution's main witness, John Anthony Housand, testified at great length (Tr. 282-567) on these issues of motive, intent and identity, to certain alleged statements by the defendants as to their awareness that Daniel LaPolla was a prosepective Government witness against them on the M-16 gun case, and as to their allegedly hiring John Anthony Housand to shoot Daniel LaPolla. Appellant Marrapese did not testify in his own defense, nor did his co-defendant, Nicholas Zinni. Nor was there any 'alibi' defense as to the actual date of the death of Daniel LaPolla, September 29, 1972. In fact, the entire defense consisted merely of an attempt to contradict the statement of prosecution witness, John Anthony Housand, that he had an alleged 'conspiratorial' meeting on May 8, 1972 at Carter's Jewelry Store, Cranston, Rhode Island with Appellant Marrapese, co-defendants Zinni, Guillette, and Joost, and an attorney, Andrew Bucci, wherein he allegedly was hired by these men to shoot Daniel LaPolla for the sum of five thousand dollars ($5,000.00). The testimony of the defense witnesses pertained to the presence of Mr. Bucci, Mr. Zinni and Appellant Marrapese in the Providence Superior Courthouse on the morning of May 8, 1972, and therefore, not at any alleged meeting with

Mr. Housand at Carter's Jewelry Store (Tr. 1018-1154). Thus, in no way did the defense "put in issue" or "sharpen any issue" in the case thereby causing or necessitating the Government's use of this highly prejudicial and inflammatory so-called 'prior act or offense' tape recorded evidence EVEN IN THE PROSECUTION'S REBUTTAL EVIDENCE, MUCH LESS IN THEIR CASE-IN-CHIEF!

Furthermore, Appellant Marrapese alleges that the careful TIMING utilized by the prosecution in this case is all important. The testimony of the law enforcement officers concerning the facts surrounding the obtaining of this tape, and the actual playing to the jury of this tape recorded conversation, as to an alleged intent to dynamite the Brooklyn Jail and the entire prison population, immediately preceded the testimony of the prosecution's star witness, John Anthony Housand. And, in this prosecution, the Government's entire case was based, for the most part, upon the credibility of this one witness, John Anthony Housand. Appellant Marrapese respectfully contends, that the introduction by the Government of this highly inflammatory tape recorded evidence in their case-in-chief immediately prior to Mr. Housand's testimony, was an obvious prosecution attempt to provide a solid foundation or support for any possible shakiness in Mr. Housand's credibility as a Government witness. Any so-called "actual need" for this highly prejudicial and inflammatory evidence, therefore, was not caused by the defense "putting in issue" or "sharpening any issue" in the case! In *United States* v. *Byrd*, 352 F.2d 570 (2nd Circ. 1965) the defendant was an office auditor for the Internal Revenue Service who was charged with accepting money from an accountant named Kaufman to 'Okay' the returns of some of Kaufman's clients. Kaufman, after testifying to the transaction charged, also, over defense objection, testified to an almost identical transaction involving clients of his that were not mentioned in the indictment. At page 574 this Honorable Court applies the 'Balancing Test' as follows:

"The exercise of discretion must be adduced to a balancing of the PROBATIVE VALUE of the proffered evidence, on the one hand, AGAINST ITS PREJUDICIAL CHARACTER on the other. The probative value is measured by the extent to which the evidence of prior criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent, or tends to negate the claim that the acts were committed innocently, or through mistake or misunderstanding."

The Court went on to add:

"From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts"...

"... Another factor to be considered is WHETHER THE GOVERNMENT WAS FACED WITH A REAL NECESSITY which required it offer the evidence in its main case. The defense had not either in its claims as to the statement of facts it would seek to prove "sharpened" the issue of intent by asserting that the act charged was done innocently or by accident or mistake... Nor did the Government suffer from a lack of evidence of intent... There was, therefore, no pressing necessity that the evidence of that prior occasion be offered on the Government's main case. *United States* v. *Ross*, 321 F.2d 61, 67 (2nd Circ. 1963)... For the present purpose of this discretion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. WHERE THE PREJUDICE IS SUBSTANTIAL AND THE PROBATIVE VALUE THROUGH THE NATURE OF THE

> EVIDENCE, OR THE LACK OF ANY REAL NECESSITY FOR IT, IS SLIGHT, ITS ADMISSION AT THAT STAGE MAY BE HELD TO BE AN ABUSE OF DISCRETION. REMANDED FOR A NEW TRIAL." (Emphasis added)

United States v. *Ross* (supra) cited in the *Byrd* decision was one of the *Kimbal Securities cases*, which was a 'boiler room operation' whereby near-to-worthless securities were sold by the defendant and others to individuals around the country. At the trial the defendant objected to cross examination in the area of his past activities as a securities salesman, saying that it was insinuated prior misconduct. At page 67 this Honorable Court stated in part:

> ". . . . . when the crime charged involves the element of knowledge, intent or the like, the State will often be permitted to show other crimes IN REBUTTAL, AFTER THE ISSUE HAS BEEN "SHARPENED" BY THE DEFENDANT'S GIVING EVIDENCE of accident or mistake, more readily than it would as part of its CASE-IN-CHIEF at a time when the Court may be in doubt that any real dispute will appear on the issue. Here *Ross* had sought in his direct testimony to depict himself as a unwilling shill in Kimball's iniquitous venture, it was wholly proper for the Government to rebut this claim of ignorance and innocence." (Emphasis added)

Appellant Marrapese respectfully contends that his case presents a much stronger argument for inadmissibility than either the *Byrd* or *Ross* cases previously cited. The *Byrd* case presented not merely a similar act, but an identical 'prior offense'. In the instant case of Appellant Marrapese, as previously discussed, there is a serious question whether or not any prior 'offense' at all is present as opposed to a mere declaration of intention or possible threat at best. There is further the matter of the lack of the clear and convincing quality of the evidence offered. And as in the *Byrd* case and unlike the *Ross* case, in the instant case of Appellant Marrapese, nothing was done by the defense to "sharpen any issue" thereby

creating any "real necessity" for the Government's use of this evidence. It should be noted that in *Ross* the evidence was ruled properly admissible, not in the prosecution's main case, but only in rebuttal after the defendant himself "sharpened" the issue of accident or mistake by testifying to his claim of innocent intent. The appellant Marrapese did not testify, nor did he offer any other evidence to "sharpen" any issue in the case. And it was stipulated that there was no issue of accident or mistake in the death of Daniel LaPolla. Also, in both the *Byrd* and *Ross* decisions, the acts done by the defendants were equivocal as to the intent accompanying such act. In the instant case of appellant Marrapese, however, the act of killing a man by blowing him up with dynamite is not equivocal in nature as far as the intent accompanying the act is concerned. The act speaks for itself as to this issue. Also, the Court's statement in the *Byrd* decision that the Government did not suffer from a lack of 'other' evidence on the issue of intent is also applicable to the instant case of Appellant Marrapese. In fact, in Appellant Marrapese's case, the Government was in possession of a substantial amount of other evidence on these issues of motive, identity, and intent, as will be discussed more completely concerning paragraph (B)(3) infra.

Further, by analogy, in the *Byrd* and *Ross* cases, the prejudicial effect of the 'prior offense' evidence concerning mere prior fraud transactions, in no way compares with the alleged 'prior act' evidence in Appellant Marrapese's case consisting of the highly inflammatory statement of intention to dynamite an entire jail facility including the entire prison population of perhaps several hundred people! Therefore, Appellant Marrapese respectfully alleges that this Honorable Court's reasoning in the *Byrd* decision should be even more applicable to his case.

Concerning (B) (3) above, the Appellant Marrapese contends that there was no "actual need" for the Government's use of this alleged 'prior act or offense' evidence required under the 'Balancing Test' set forth in the *Bradwell* and *Byrd* cases, since there was ample 'other'

evidence available to the prosecution bearing on the relevant issues. In fact, the Government presented a substantial amount of 'other' evidence on the issues of motive, identity, and intent, as set forth in detail in "Question Presented Number One and Argument Thereon." Actually while it is not incumbent on the prosecution even to prove motive, in Appellant Marrapese's prosecution most of the Government's case was built around motive interwoven with identity and intent, and virtually all of the evidence produced was directed at these issues! In the instant case, the indictment itself charged the reason for the alleged interference with Daniel LaPolla's civil rights, stating that he was to have been a potential witness against the named defendants at the M-16 rifle trial (R. Vol. XIII, Doc. No. 13). In addition, as previously set forth, at this instant trial of Appellant Marrapese for Daniel LaPolla's death, the prosecution read to the jury the indictment in it's entirety from the M-16 gun theft case, (which indictment names Daniel LaPolla, but not as a defendant), in order to show to the jury the defendants' awareness at their arraignment on May 4, 1972 that Daniel LaPolla was a Government witness, as Government proof that the named defendants had a motive to kill Mr. LaPolla (Tr. 7-11). In addition, the prosecution's main witness, John Anthony Housand, testified at great length (Tr. 282-567) on these issues of motive, identity, and intent, including his testimony that on May 8, 1972 at Carter's Jewelry Store, it was, in fact, the named defendants who allegedly hired Mr. Housand to shoot Daniel LaPolla because they believed he was a Government informant who was to be a witness against them at the forthcoming trial for the theft of the M-16 rifles. Also, the Government introduced a considerable amount of evidence concerning the visits of Appellant Marrapese to Oneco, Connecticut (Tr. 569-572), and attempts to interview Mr. Marafino (Tr. 601-611), and Mrs. Kiely (Tr. 621-631) in order to locate Daniel LaPolla; the airplane ride of co-defendants Joost and Guillette circling over Daniel LaPolla's house in Oneco, Connecticut, searching

for him (Tr. 787-821); and immediately following the death of Daniel LaPolla's brother, the visits of Appellant Marrapese, co-defendants Joost, Guillette, and Attorneys Andrew Bucci and John O'Neill to the funeral home, church and cemetery looking for Daniel LaPolla, [see numerous pages of testimony by three federal agents, Smith (Tr. 85 et seq.), Watterson (Tr. 662 et seq.), and Petrella (Tr. 822 et seq., 1417 et seq.)]. All of this evidence obviously bears directly on these issues of motive, identity and intent. Certainly, the Government had more than ample 'other evidence' available to it on these issues without the "actual need" of admitting into evidence the highly prejudicial and inflammatory evidence of a prior declaration of intention to dynamite an entire jail and all of its occupants- And, as stated previously, it was stipulated by the defense that there was no issue of accident or mistake in the case, in that Daniel LaPolla did not die by any accident. And concerning the issue of intent, this is a case wherein the criminal intent may be inferred from the nature of the act itself. The act of blowing up someone with dynamite itself supplies the requisite criminal intent, as opposed to those equivocal type of acts such as fraud transactions wherein the act might either be the result of accident or mistake or performed with a criminal intent. As for those crimes, wherein a criminal intent is not inferred from the mere commission of the act itself, proof is often unobtainable except by evidence of successive repetitions of the act or of similar acts, such as evidence of prior fraud transactions. However, in the instant case of the Appellant Marrapese, wherein the charges pertain to the blowing up of a man with dynamite, the criminal intent immediately flows from the very nature of the act itself, and evidence concerning 'prior similar offenses' or 'prior declarations' of such are obviously not necessary on the issue of the intent accompanying such an act. Proof of any number of repetitions of such an act could add nothing to the conclusive influence of criminal intent which proof of the one act itself affords. Appellant Marrapese respectfully contends, therefore,

that there was ample 'other evidence' available to the prosecution on the issues of motive, identity, and lack of accident or mistake, and that the Trial Court's ruling admitting into evidence the highly prejudicial, inflammatory content of the tape recording pertaining to the Brooklyn Jail bombing was reversible error when applying the 'Balancing Test' set forth by this court in both the *Byrd* and *Bradwell* decisions. As for the so-called 'common scheme or plan' exception to the general rule of inadmissibility, it does sometimes happen that two or more crimes are committed by the same person in pursuance of a single design or under circumstances which render it impossible to prove one without proving all. But, to bring a case within this exception there must be evidence of a system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme. *Underhill* in his work on *Criminal Evidence* states this exception to the general rule as follows:

> "No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general composite scheme or plan."

Obviously, at the time of the tape recorded conversation in March 1972, which pertained to the bombing of the Brooklyn Jail, there was no plan to kill Daniel LaPolla since, obviously, no one engaging in such conversation even knew at that time that Mr. LaPolla was then acting as a Government informant and carrying hidden a tape recording device. There was no proof offered by the Government of any connection or relationship between Daniel LaPolla and the person in the Brooklyn Jail who was to have been the target of the alleged bombing, no evidence of his identity, nor in what case he was to have been a witness, if, in fact, he was to have been a witness at all. Therefore, there was no evidence or even any indication whatsoever of any general composite scheme or plan concerning this conversation about the Brooklyn Jail and

Daniel LaPolla's being a witness at the trial for the theft of the M-16 rifles, or at any trial for the death of Mr. LaPolla. And the defense did not "put in issue" or "sharpen any issue" in the case which may have caused the Government's use of evidence of any 'prior offense' as being part of a 'common scheme or plan.'

Concerning (B) (4) above, under the so-called 'Balancing test' set forth in *United States* v. *Bradwell* (supra), *United States* v. *Byrd* (supra), and other case authority within the jurisdiction of this Court of Appeals for the Second Circuit as well as throughout the United States, the Appellant Marrapese respectfully alleges that the prejudicial effect of the content of the tape recorded conversation concerning the dynamiting of the Brooklyn Jail tremendously outweighed it's probative value! In virtually every case wherein such evidence of 'prior act or offense' has been admitted, this 'prior evidence' has pertained to virtually identical, non-inflammatory types of offenses. For example, *United States* v. *Deaton,* 381 F.2d 114 (1967, 2nd Cir.) entailed three similar fradulent mortgage transactions; *United States* v. *Bozza,* 365 F.2d 206 (1966, 2nd Cir.). Another post office burglary prior to the post office burglary charged in the indictment; *United States* v. *Johnson,* 382 F.2d 280 (1967, 2nd Cir.) in a trial for the theft of interstate shipments, evidence was admitted that at a prior time a trucking company delivery man was struck in the face and held up by the defendant. In other cases the evidence has been ruled inadmissible because "it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused." *United States* v. *Smith,* 283 F.2d 760 (1960, 2nd Cir). A similar rationale was stated in *Michelson* v. *United States,* 335 U.S. 469 (1948). Also, in *Kempe* v. *United States,* 151 F.2d 680 (1945, 2nd Cir.) the Court held that proof of other crimes cannot be shown to prove a habit or disposition of the accused to commit a crime on the ground that such proof would show a probability of the defendant to commit the crime charged. Appellant

Marrapese would also respectfully ask this Honorable Court to take note that in the instant case of Appellant Marrapese, virtually the entire defense was directed at the attempted impeachment of the Government's principal witness, John Anthony Housand, both by cross-examination of Mr. Housand and by the testimony of virtually every defense witness. In *United States* v. *DeCicco,* 435 F.2d 478 (1970, 2nd Cir.) a prosecution for receiving stolen property, the Government sought to introduce prior receiving transactions between the defendant and the government's principal witness, one Paul Parness. The Court of Appeals for the Second Circuit stated:

> "In this case almost the entire defense was the attemted impeachment of the Government's principal witness Paul Parness."

This Honorable Court ruled that the defense strategy in the *DeCicco* case was principally designed at attacking the credibility of the Federal witness, and that:

> "Therefore, whatever probative value the prior crimes . . . added to the prosecution's case, the issue of the defendant's intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw . . . ."

Thus, in the *DeCicco* case, the Court speaking through Judge Waterman, ruled that the other crimes evidence was not admissible, finding that it's prejudicial effect far outweighed any probative value it might have. In fact, the Court found little, if any, probative value in light of the fact that the defendant's defense was not based on lack of knowledge or intent, but almost entirely, as is the instant case of the Appellant Marrapese, upon the lack of credibility of the Government's main witness!

Further research on behalf of Appellant Marrapese has uncovered not one case of those cases wherein the evidence of a 'prior act or offense' has been ruled to be admissible, where such 'prior act or offense' has been as highly prejudicial and inflammatory as the instant con-

versation between a defendant and a future murder victim himself, and pertaining to the dynamiting of an entire jail together with it's entire prison population of perhaps several hundred occupants! And, it should also be noted that in addition to the resulting prejudice from the use of such highly prejudicial and inflammatory evidence of 'prior acts or offenses' as a statement of intention to dynamite an entire jail and all of its occupants, there is always the present danger that the jury will convict a person of a subsequent offense when they learn that the defendant has allegedly committed a prior similar act or offense. The very fact that it is much easier to believe in the guilt of an accused person, when it is known or suspected that he has previously committed a similar crime, proves the dangerous tendency of such evidence to convict not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. A classic case would be, for example, of a physician on trial for abortion who denies having committed any such abortion, and then it is revealed to the jury that the physician has committed a prior similar abortion. In most instances, for all practical purposes, the trial is all over, and the physician's guilt resolved, as soon as such occurs! In *Shaffner* v. *Commonwealth*, 72 Pa. St. 63, the heighest Court of Pennsylvania stated:

> "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor linking them together for some purpose he intended to accomplish; or, it must identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which he would be acquitted if fairly tried."

And the prosecution in this case was not content to play the tape recording only once to the jury while the jury read along from the written transcription thereof immediately preceeding the testimony of the Government's principal witness, John Anthony Housand (Tr. 118-190). Rather, the prosecutor continued to perpetuate the error and to magnify the prejudicial effect of this evidence by replaying the recording, while the jury again read along from the transcription thereof, during his opening argument to the jury after both sides had rested, and by repeatedly referring to the content of this tape recording during both his opening and closing arguments to the jury. In this regard, in his opening argument, the prosecutor stated: (Tr. 1478-9) (A. 80, 81)

> "The second thing that strikes anyone reading this indictment, and certainly you have to consider the indictment, is that dynamite was used, and who had possession of dynamite? Without which this device here obviously could not have functioned. Two people. One, David Guillette, when he and John Housand burglarized Mike Lanoux's trailer in Manville, Rhode Island and took dynamite sticks and blasting caps which were then possessed by David Guillette to a place unknown. Who else? William Marrapese whose own voice you will hear in a few minutes state that he had possession of dynamite, and he is going to use it to take someone off, to kill. Who? A witness, a witness in the Brooklyn Jail.

Shortly thereafter in his opening argument to the jury the prosecutor stated: (Tr. 1480-1481) (A. 81, 82)

> "Now, you see in front of you earphones, and I will ask you at this time to take those earphones together with the transcripts. Can I ask you to take them for a minute, please? When you listen to the tape recording, listen very closely because you are going to hear the voices of Daniel LaPolla, William Marrapese and Nicholas Zinni. You are not going to hear them

discuss what the Yankees did that day. You are not going to hear them discuss what new cars were bought. You are going to hear them discuss stolen M-16's and dynamiting the Brooklyn Jail.

(At this time the Court, Jury Members and Counsel listened to the tape from 11:06 a.m. to 11:15 a.m.)

Mr. Coffey: Twice during that conversation Daniel LaPolla refers to William Marrapese by name. 'Billy. Hey Billy, you trying to get rid of the rat population up there?' 'Yeah.' 'Who's up there?' 'Oh, they got all kinds of witnesses up there.' 'We figure if the whole joint goes, we're guaranteed to get him.' 'We got eight sticks.' "

And a short time later, the prosecutor's actual concluding remarks in his opening argument to the jury were as follows: (Tr. 1495)

"The sad part of it is they were so desperate, they risked the lives of not only Daniel LaPolla, but everyone associated with him. 'I am going to take him off. They got all types of witnesses. We got eight sticks. I'm going to take him off.' "

And during his closing argument to the jury, the prosecuting attorney continues to refer to this tape recorded conversation: (Tr. 1610-1611) (A. 31)

"In fact, when William Marrapese said 'We've got eight sticks.' 'We've got eight sticks,' these are the managerial aspects of the conspiracy, particularly William Marrapese, the managerial aspects. Not the blue collar worker, so to speak, who actually goes out and makes up the bomb."

Again in his closing argument the prosecutor refers to the tape recording (Tr. 1620-1621) (A. 83, 84)

"Now, there are many items raised by both the Government and the defense, some of which are in conflict. Perhaps the most significant one, perhaps the one with

which you can weigh if it can be said this way, the credibility of the defense argument is to recall the statement by Mr. Daniels that William Marrapese's threat to blow up the Brooklyn Jail with witnesses inside of it was an idle boast. Is that an idle boast? Was it said with the same type of idle boast that he had just got through saying that he was setting $100.00 apiece for the M-16's? Was that an idle boast that related to the offense under which he was ultimately indicted? It wasn't an idle boast. William Marrapese himself, out of his own mouth, without knowing that he was being recorded, without having any idea that his statements would be challenged, which removes any motivation to lie, which is important. It was said in the relative security of knowing he was saying it to whom he believed to be a friend. He admitted culpability as to Nicholas Zinni in the gun case. He stated that they had enough dynamite, 'We have enough dynamite to blow up the Brooklyn Jail.' It's important because it places in his possession, an environment where there is no reason to lie. Possession of dynamite."

In addition, although specifically requested by the defense to do so, both immediately prior to the initial playing of the tape to the jury (Tr. 189) (A. 84), and in its concluding instructions, the Trial Court refused to instruct the jury concerning the limited purpose for which this so-called 'other act or offense' evidence may be considered by them, once the Court ruled it admissible. The following instruction was one of four concerning the tape recordings which was specifically requested by the defense to be given to the jury by the Court:

> "If you believe the Government's witnesses as to the accuracy of the voices identified and subject matter stated therein, then you must not consider the tapes as being admitted for the truth of what was said, but you may consider such testimony as tending to show a state of mind."

Instead, the Court gave only one instruction concerning the tape recording as follows: (Tr. 1645):

> "In connection with the tapes that have been received in evidence and which you have heard played, you must remember that unless you accept the testimony of the two Government witnesses who identified the voices, there is no other testimony identifying the voices. If you do not accept their testimony, then the tapes as evidence are worthless. And remember too what I told you about the transcripts. The transcripts are not evidence of what was said. You must rely solely on the voices that you heard and use the transcripts only as an aid in helping you to understand what you hear. In sum, if you are satisfied of the tapes reliability and trustworthiness, their fidelity and audibility, you may accept them as a recording of the conversations that took place on March 30, 1972."

The Appellant Marrapese respectfully alleges, therefore, that the prejudicial effect of this so-called 'prior act or offense' evidence tremendously outweighed its probative value, and further, that based upon the foregoing reasons as stated, the Trial Court's ruling admitting such evidence deprived the Appellant Marrapese of his Constitutional right to a fair trial by an impartial jury and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Concerning (C) supra, the Appellant Marrapese respectfully alleges that the manner in which the tape recorded conversation was obtained violated the Fourth, Fifth and Ninth Amendments to the United States Constitution. However, in the interest of brevity and to avoid duplicity, he would respectfully refer the Court to those legal authorities cited and argument presented on this issue as contained in the Appellant's Brief in *United States* v. *Marrapese*, 486 F.2d 918 (2nd Circ. 1973) as incorporated herein by reference (A. 5).

III. The Trial Court's Ruling Denying Co-Defendant David Guillette's Pretrial Motion to Suppress Deprived the Appellant Marrapese of His Constitutional Guarantees Pursuant to the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

Co-defendant, David Guillette, filed a pre-trial motion to suppress certain evidence seized by Alcohol, Tobacco and Firearms agents from Mr. Guillette's apartment on March 20, 1973 and from his automobile on December 11, 1972. The District Court denied Mr. Guillette's motion without opinion. Since the items seized were allegedly the property of Mr. Guillette, and taken from Mr. Guillette's apartment and automobile, Mr. Guillette was selected to go forward with a pretrial Motion To Suppress. However, Appellant Marrapese now respectfully urges the Trial Court's denial of Mr. Guillette's pretrial Motion To Suppress as a violation of Appellant Marrapese's Constitutional rights, and prays that this Honorable Court afford him the benefit of a favorable consideration on this issue.

(A) The prosecution's principal witness was John Anthony Housand, whose presence and testimony at Appellant Marrapese's trial was the direct result of Mr. Housand's signed statement or so-called 'affidavit' which was illegally seized during the search of Mr. Guillette's residence, and, such testimony, therefore, should also have been suppressed as the 'Fruit of the Poisonous Tree.' *Wong Sun* v. *United States,* 371 U.S. 471 (1963), (and related cases).

(B) Appellant Marrapese respectfully alleges that he does have sufficient standing to raise this issue for consideration on appeal under authority of *Jones* v. *United States,* 362 U.S. 261; *Simmons* v. *United States,* 390 U.S. 377; *Commonwealth* v. *Weeden* (Penna.—7-1-74), 15 Cr. Rptr. 2371; *People* v. *Martin,* 45 Cal. 2nd 775, 290 P.2d 855; *McDonald* v. *United States,* 335 U.S. 451; *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905; *People* v. *Smith,* 230 N.Y.S. 2d 894 (1962); *LaFrance* v. *Bohlinger,* 499 F.2d 29 (1st Cir. 1974); 38 U. of Cincinnati L. Rev. 691; 11 Duquesne L. Rev. 179.

(C) Appellant Marrapese respectfully urges that the 'Plain Error Doctrine' set forth in Rule 52(b) of the Federal Rules of Criminal Procedure be considered by this Honorable Court as being applicable to his cause; this doctrine specifically stating that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

In the interest of space and brevity and to avoid duplication with permission of this Honorable Court, Appellant Marrapese hereby incorporates by reference, and as a part hereof, those arguments and authorities set forth on this identical issue as "Point VII" within the appellate brief filed with this Honorable Court on behalf of Mr. Guillette. Concisely stated, Appellant Marrapese alleges that the Trial Court at the hearing on Mr. Guillette's Motion To Suppress should have ruled that the Search Warrant was invalid and that the testimony of the Government's principal witness, John Anthony Housand, should have been suppressed,

(1) the affidavit upon which the search warrant was based failed to set forth sufficient facts to constitute probable cause, and

(2) was fatally defective due to the delay between the date of the observations made, which were the alleged basis for the application for the warrant, and the date of the actual issuance of the warrant, and

(3) since the search warrant was invalid, the seizure from Mr. Guillette's apartment of a signed statement of John Anthony Housand, which was not contraband nor evidence of a crime, was an unlawful seizure, and, therefore, the trial testimony of prosecution witness, John Anthony Housand, being the direct result of the seizure of this signed statement, should also have been suppressed as the "Fruit of the Poison Tree" under authority of *Wong Sun* v. *United States,* (supra) (and related cases), and

(4) even assuming, arguendo, that the Seach Warrant was valid, the signed statement of John Anthony Housand was not described in the Search Warrant as an item to be seized, was not contraband nor evidence of a crime, and the seizure of such signed statement or affidavit was, therefore, illegal. And, as previously stated, since the trial testimony of John Anthony Housand was the direct result of the seizure of this signed statement, such testimony should also have been suppressed as the "Fruit of the Poison Tree". *Wong Sun* v. *United States* (supra), (and related cases).

Appellant Marrapese would further point out that Guillette's apartment is in Providence, Rhode Island, and that the latest decision by the Supreme Court of the State of Rhode Island, *State* v. *Tella,* 321 A.2d 87 (6/12/74), is in complete accord with Appellant Marrapese's position as stated in paragraph (2) supra. In the *Tella* case, the Court held that where recent information was received as to observations made within the defendant's premises some 11 months prior to the issuance of a search warrant, due to the unreasonable lapse of time there was no showing of probable cause for believing that the property, which is the object of the search, is still on the premises at the time of the issuance of the warrant, and therefore, the resulting search was unlawful. [see *Tella* opinion (A. 24).] The Rhode Island Supreme Court commented in its opinion at page 90 thereof:

> ..."Just because those rules are relaxed, however, does not mean that inferences should be pyramided in order to find timely probable cause, particularly when the state has been unable to cite a single case wherein the time differential between the observations and the warrant has even approached 11 months."[5]

And in footnote 5 at page 90 of the opinion, it is stated:

> "... The usual dividing line between what is stale and what is timely, however, is 30 days. See Annot. 100

A.L.R. 2d 525, 534-42 (1965). This was recognized in *Schoeneman* v. *United States,* 115 U.S. App. D.C. 110, 317 F.2d 173, 177 (1963) where the court noted: "... we cannot overlook the fact that the Government could cite, and we could find, no case which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis for the search."

Appellant Marrapese respectfully contends, therefore, that due to the lapse of time between the alleged observations of A.T.F. Agent Weronik on May 4, 1972 and the application for and execution of the Search Warrant for Guillette's apartment on March 20, 1973 there was no probable cause to believe that the items allegedly observed on May 4, 1972 would still be there at Guillette's apartment approximately 10 - 11 months later on March 20, 1973, and thus the Search Warrant is invalid. [See also *Sgro* v. *United States,* 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932); *United States* v. *Ramirez,* 279 F.2d 712, 715 (2nd Circ. 1960).]

IV. The Trial Court's Error in Denying Appellant's Motion to Dismiss Count I of the Indictment for Lack of Jurisdiction Deprived the Appellant of His Guarantees Pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Appellant Marrapese filed a pretrial motion to dismiss Count 1 of the Indictment for lack of jurisdiction (R. Vol. XIII, Doc's 36, 39, 40) (A. 17). This motion was denied on July 31, 1973. The grounds supporting this motion were again argued before the Trial Court pursuant to Appellant's motions under Federal Rules 29 (a), (b), and (c) (Tr. 1722-1727), said motions being denied by the Court on June 26, 1974.

The purport of appellant's argument is that the Federal Court lacks jurisdiction over alleged violations of civil rights pursuant to 18 U.S.C. 241, unless it is first alleged and then establsihed that the violation of civil rights was 'racially motivated'.

Appellant is aware of the arguments made to this Honorable Court on this point by defense counsel in *United States* v. *Pacelli,* 491 F.2d 1108 (2nd Cir. 1974), and on behalf of co-defendants Joost and Guillette, counsel for Appellant Marrapese having assisted in both arguments. And, in the interest of brevity, with permission of this Honorable Court, Appellant Marrapese adopts such arguments as his own for the purposes of this brief as incorporated herein by reference.

Appellant also respectfully refers this Honorable Court to a series of quotations concerning the legislative purpose of 18 U.S.C. 241 which were not included in the aforementioned arguments. These quotations, appearing in the Congressional Record, are of statements made, during a six week debate over the provisions of the bill, by Senators Sam Ervin and Philip Hart (A. 22).

Appellant would also refer to the dissenting opinion in *Anderson* v. *United States,* 94 S. Ct. 2253 (1974) wherein Mr. Justice Douglas stated on page 2269 thereof:

> "The argument ignores the intent of Congress as manifested by the legislative history of Section 241. Congress did not intend to reach local election malfeasance where there was no evidence of racial bias because it did not believe it had the power. It expressed unwillingness to interfere with the right of the States . . . . where there was no racial discrimination."

Appellant would further urge that the assumption of jurisdiction by the Trial Court under 18 U.S.C. 241 was arbitrary and capricious having no reasonable connection with the purpose of the statute as promulgated by Congress and as reflected in their debates, and was, therefore, contrary to the appellant's rights under the Fifth Amendment and other applicable provisions of the United States Constitution. That is, unless the 'racially motivated' criteria is applied to 18 U.S.C. 241, there is no reasonable criteria under which a prosecution can be guided in order to make a determination whether to proceed on a particular

matter under this statute. It is mere common knowledge that throughout the United States each year there are a number of conspiracies to murder, conspiracies to break and enter, conspiracies to commit robbery, etc. Without such a workable criteria, the Government's assumption of jurisdiction over one conspiracy rather than another is merely an arbitrary selection left to the whim of the prosecution and is thus violative of *Yick Wo* v. *Hopkins*, 118 U.S. 356. [See also, *United States* v. *Robinson*, 311 F. Supp. 1063 (1969 Mo.)]. To hold otherwise, appellant respectfully contends, would be to permit the power of the Federal Government to be arbitrarily and selectively enforced against whichever person the Government chooses to prosecute federally for an offense already punishable by a State statute, while choosing not to prosecute federally another individual for the same identical offense, thus amounting to a discriminatory enforcement of a Federal statute.

V. The Trial Court Erred in Denying Appellant's Motions (A) to Dismiss the Indictment on the Ground that Appellant Was Indicted by a Biased Grand Jury and (B) to Conduct a Voir Dire Examination of Each Grand Juror as to Any Bias or Prejudice Against the Appellant and His Co-Defendants.

Appellant and co-defendants Joost, Guillette and Zinni moved pretrial to dismiss the instant indictment returned against them on May 4, 1974 on the ground that they had been indicted by a biased Grand Jury. The basic thrust of their Motion to Dismiss was that the Grand Jurors who indicted them on the instant charges involving the death of Daniel LaPolla were the very same Grand Jury members before whom Daniel LaPolla had previously testified in person, which testimony resulted in the previous indictment of the Appellant and his co-defendants on the charges concerning the theft of the thirty M-16 automatic rifles. Their contention, therefore, is that, human frailties being what they are, these Grand Jury members may very well have not been acting fairly and impartially, either

consciously or sub-consciously, when evaluating the evidence which resulted in the instant indictment. In dismissing the motions the Trial Court, however, did acknowledge that the better procedure would have been to have separate Grand Juries in the two cases.

The motion was again reargued by counsel for Appellant Marrapese, following conviction on the instant charges, at the hearing on his Motion for New Trial just prior to sentencing on June 26, 1974. (T. Tr. 1748).

The Appellant's Brief for co-defendants Robert Joost and David Guillette, which has already been filed in this Honorable Court, (oral argument having already been given by counsel thereon), contains this precise "Question Presented" as "Point XIII" thereof, complete with authorities cited therein and argument in support thereof. In the interest of brevity and to avoid duplicity, with permission of this Honorable Court, Appellant Marrapese hereby adopts the content of "Point XIII" as incorporated herein in it's entirety.

VI. The Trial Court's Error in Denying Apellant's Motion to Waive a Trial by Jury Denied the Appellant of Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

Appellant and co-defendant Nicholis Zinni each filed a pretrial Motion to Waive Jury Trial (R. Vol. XIII, Doc. 41; A. 21), on the ground, as stated in the motion, that at the time of their arraignment on the instant indictment the prosecutor asked the Court for twice the amount of bail for co-defendants, Joost and Guillette as for Marrapese, and Zinni, the prosecutor offering as his reason, that the Government's case against the former was much stronger than against the latter. On July 23, 1973 the Court held the motion in abeyance until just prior to trial, and on October 24, 1973, after hearing thereon, the prosecution objecting thereto, the motion was denied. The Court severed the cases of Marrapese and Zinni from Joost and Guillette, the latter defendants being convicted following

jury trial January 10, 1974, and Appellant Marrapese and co-defendant Zinni being convicted following jury trial on June 12, 1974.

Appellant further contends that his case involved technical issues of statutory construction which would, and, in fact, did lead to jury confusion, and would best be decided by the Court sitting without a jury, as illustrated by the questions propounded by the jury to the Court during their deliberations at his trial. (With permission of this Honorable Court, the authorities cited and arguments on appeal by co-appellant Zinni in this regard are incorporated herein by reference.) Also, the complexities of this case are demonstrated by a comparison of the facts offered by the Government at trial with the statutory wording and construction of the instant indictment as set forth in detail in "Question Presented Number One and Argument Thereon" in this brief.

Further, Appellant was effectively prevented from testifying in his own behalf since he would have been impeached by his prior conviction involving the theft of the M-16 rifles. The jury's knowledge of the fact of this conviction would have greatly strengthened the reliability of the sole informant, Daniel LaPolla, and corroborated the prosecution's theory of the motive for his death, i.e. to prevent him from testifying against the defendants.

Also, at a pretrial hearing wherein the Government's evidence was also based primarily upon the credibility of John Anthony Housand, as it was at the trial, the Court ruled that a Government offer of 'prior offense' evidence, involving the alleged use of dynamite to commit a burglary, was inadmissible.

Further, saturation-type, highly inflammatory and prejudicial local publicity was attendant to both the indictment involving the theft of the thirty M-16 rifles and the instant indictment concerning Mr. LaPolla's death.

In *Singer* v. *United States,* (1965) 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (Noted (1965) 13 U.C.L.A. L. Rev. 189) the Court recognized that the prosecution was under a duty not to withhold consent to jury waiver arbitrarily,

and that situations may arise in which compelling a defendant to submit to a jury trial might constitute a denial of due process "where a defendant's reasons for wanting to be tried alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial," i.e. "that there might arise situations where 'passion, prejudice . . . . public feeling' . . . or some other factor may render impossible or unlikely an impartial trial by jury". Appellant respectfully alleges that based upon the foregoing, the Trial Court erred in not permitting Appellant to proceed to trial before the Court sitting without a jury, and that such error resulted in a denial of due process of law.

CONCLUSION

Based upon the foregoing, Appellant Marrapese respectfully requests that this Honorable Court grant him a new trial.

Respectfully submitted,

By His Counsel,
RAYMOND J. DANIELS
86 Weybosset St., Suite 502
Providence, R.I. 02903
JOHN O'NEILL
9 Steeple Street
Providence, R. I. 02903

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Dear Sir:

Herewith are twenty-five copies of the brief and ten copies of the Appendix for the Appellant in No. 74-1941

UNITED STATES

v.

WILLIAM MARRAPESE, ET AL.

We certify that we have made service on opposing counsel by delivering two copies of each document to the post office with air mail postage prepaid; addressed as follows:

Paul E. Coffey, Esq.
Special United States Attorney
458 Main Street
Hartford, Conn.

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